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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~455.~~ 180

GEORGE REYNOLDS, PLAINTIFF IN ERROR,

vs.

THE UNITED STATES.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

FILED OCTOBER 4, 1876.

SUPREME COURT OF THE UNITED STATES.

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a TERRITORY OF UTAH,
County of Salt Lake, ss:

In the supreme court.

Be it remembered, at a term of the supreme court in and for the Territory of Utah, begun and held at Salt Lake City, county of Salt Lake, Territory of Utah, on the 5th day of June, A. D. 1876.

Present and presiding, his honor Michael Schaeffer, C. J., and his honor Philip H. Emerson, A. J., his honor Jacob S. Boreman, A. J.

Among the records and proceedings of said court were the following, to wit:

On the 15th day of March, A. D. 1876, came George Reynolds, by his attorney and counsel, Williams and Young, and Sheeks and Rawlins, and filed with the clerk of said court the records and proceedings
b had in the district court of the 3rd judicial district of the Territory of Utah, of which the following is a full, true, and correct printed copy, namely:

1 UNITED STATES OF AMERICA,
Territory of Utah:

Third judicial district of the October term, A. D. 1875, of the district court in and for said district, held in Salt Lake County.

Indictment for bigamy.

THE UNITED STATES,
vs.
GEORGE REYNOLDS.

The grand jurors of the United States of America, good and lawful men, residents of the third judicial district of Utah Territory, legally chosen, selected, empanelled, sworn and charged in and for the body of said district, in the name and by the authority of the United States of America, on their oaths do find and present that George Reynolds, late of said district, on the twenty-second day of July, in the year of our Lord one thousand eight hundred and sixty-five, in the city and
2 county of Salt Lake, in the Territory of Utah, and within the jurisdiction of this court, was lawfully married to one Mary Ann Tuddenham, and her, the said Mary Ann Tuddenham, then and there had and took for his wife and cohabited with her as her lawful husband, and that afterwards he, the said George Reynolds, on the third day of August, in the year of our Lord one thousand eight hundred and seventy-four, in the city of Salt Lake and county of Salt Lake and Territory of Utah, did unlawfully marry and take to wife one Amelia Jane Schofield, he, the said George Reynolds, then and there being married and the lawful husband of the said Mary Ann, she, the said Mary Ann, then being his former wife and living, she, the said Mary Ann, the wife by the said former marriage, not having been absent from the said George Reynolds for five successive years without being known to said George Reynolds within that time to be living, the said former marriage between the said George Reynolds and the said Mary Ann never having been dissolved by the decree of a competent court, nor annulled or pronounced void by the sentence or decree of a competent court on the ground of the nullity of the marriage contract entered into as aforesaid

by the said George Reynolds and the said Mary Ann; contrary to the form of the statute of the United States of America, and against the peace and dignity of the said United States.

HORACE BLISS,
Foreman of Grand Jury.
WILLIAM CAREY,
Attorney of the United States for the Territory of Utah.

3 *Indictment for bigamy.*

THE UNITED STATES
vs.
GEORGE REYNOLDS. } No. 2148.

A true bill.

HORACE BLISS, *Foreman.*

Presented in open court by the foreman of the grand jury in the presence of said grand jury and filed by me this 30th day of October, A. D. 1875.

EDW'D B. McKEAN, *Clerk.*

Witnesses: Mary Tuddenham, John Tuddenham, Daniel H. Wells, Amos K. Lucas, A. Pratt.

The people of the United States in the Territory of Utah to the U. S. marshal for said Territory, greeting:

An indictment having been found on the 30th day of October, A. D. eighteen hundred and seventy-five, in the district court for the third judicial district in and for the Territory of Utah, charging George Reynolds with the crime of bigamy, you are therefore commanded to forthwith arrest the above-named George Reynolds and bring him before that court, to answer said indictment, or, if the court has adjourned for the term, that you keep, or cause him to be safely kept, in cus-
4 tody until the further order of this court; or, if he require it, that you take before , to be admitted to bail in the sum of $.

ALEX. WHITE,
Chief-Justice and Judge of 3rd Judicial District.

Witness my hand and the seal of said court affixed at Salt Lake City this 1st day of November, A. D. 1875.

[SEAL.] EDWARD B. McKEAN, *Clerk,*
By WILLIS P. McBRIDE, *Deputy Clerk.*

At a district court of the third judicial district of Utah Territory, held at the Federal court-house in Salt Lake County, said Territory, on the 1st day of November, A. D. 1875.

Present, the Hon. Alex. White, judge of said court.

THE UNITED STATES
vs.
GEORGE REYNOLDS. } Bigamy.

The defendant having been arrested and brought into court, on mo-t'on of the U. S. district attorney it is ordered that the said defendant

be, and he hereby is, admitted to bail for his appearance from day to day at the present term of this court in the sum of twenty-five hundred dollars, with two good and sufficient sureties, to answer the indictment for the crime of bigamy filed herein against him.

5 • *Appearance bond.*

Know all men by the presents that we, George Reynolds, as principal, and Henry Grow and William H. Rowe, as sureties, are held and firmly bound unto the people of the United States in the Territory of Utah in the sum of twenty five hundred dollars, for the payment of which we and each of us bind ourselves, our heirs and legal representatives, signed with our hands and sealed with our seals this first day of November, 1875.

The conditions of the foregoing obligation are such, that whereas, on the first day of November, 1874, there is pending in the 3rd district court sitting in the county of Salt Lake an indictment against the above-bounden George Reynolds for the crime of polygamy or bigamy, under the act of Congress, upon which, by order of said court, he has been admitted to bail in the sum of twenty-five hundred dollars:

Now, therefore, if the said George Reynolds in his own proper person shall be and appear before said court on the second day of November, 1875, at 10 o'clock a. m., to answer said charge, and continue from
6 day to day and not depart without leave of court, then this obligation shall be void; otherwise to be in full force and effect.

GEORGE REYNOLDS. [SEAL.]
HENRY GROW. [SEAL.]
WM HENRY ROWE. [SEAL.]

Witness:
GEO. R. MAXWELL.
N. P. WOODS.

At a district court of the third judicial district of Utah Territory, held at the Federal court-house in Salt Lake County, said Territory, on the 7th day of December, A. D. 1875.

Present, the Hon. Alex. White, judge of said court.

THE UNITED STATES } Bigamy.
vs.
GEORGE REYNOLDS. }

This day came the defendant in open court in his own proper person, and being arraigned, enters his plea in abatement.

Thereupon the court granted time to the district attorney to file his answer to said plea.

TITLE.

1. Now comes into court here the said George Reynolds in his own proper person, and having heard the said indictment read, says that he ought not to answer or be tried upon the said indictment, for the reason that the persons acting as a grand jury, by whom the said indictment was found, were not, at the time of finding the said indictment
7 or at any time, a legal grand jury, because he says that fifteen persons and no more were, on the 13th day of October, 1875, empanelled and sworn in this court as a grand jury, to serve therein at

the October term, 1875, of this court; that the said persons, to the number of fifteen and no more, acting as such grand jury, found said indictment, and the same was not otherwise found; that the said George Reynolds was not under arrest, nor had he given bail for his appearance at said term of court, to answer the criminal charge contained in said indictment, or any charge whatever, before the said indictment was found, and this the defendant is ready to verify.

Therefore he prays judgment of the said indictment, and that the same be quashed.

2. And the said George Reynolds, for a further and distinct plea to said indictment, says that he ought not to answer or to be tried on said indictment, because he says that the grand jury that found said indictment was drawn without any public notice of the time and place of the drawing of such jury having been given by the judge of the third judicial district of said Territory; that the said George Reynolds was not under arrest, nor had he given bail for his appearance at said term of court to answer the criminal charge contained in said indictment, or any charge whatever, before the said indictment was found; and this the defendant is ready to verify. Wherefore he prays judgment of the said indictment, and that the same may be quashed.

8 3. And the said George Reynolds, for a further plea, says that he ought not to answer to or be tried on said indictment, because he says that at the time of the drawing of the said grand jury by which the said indictment was found, to wit, on the 23rd day of September, 1875, one Aaron Greenwald was drawn as one of the jurors of said grand jury, and was summoned, and on the 11th day of October, 1875, appeared to serve on said grand jury, that being the first day of the said October term, and the day upon which said grand jurors were summoned to appear.

That the said Aaron Greenwald was on the day of January, 1875, when the list of two hundred persons qualified to serve as grand and petit jurors was made, a male citizen of the United States, over twenty-one years of age, could write and read the English language, has resided in the third judicial district of said Territory for six months then next preceding, and on the said 11th of October, 1875, did, and ever since then has continued to, reside in said district.

That he was at all times herein mentioned of reputed sound mind and discretion, was not so disabled in body as to be unable to serve on said grand jury, had not been convicted of any capital or infamous crime, and owned taxable property and paid taxes in Utah Territory, and was and is in all respects competent and qualified to serve as a member of said grand jury.

And the said George Reynolds says that afterwards, to wit, on the 13th day of October, 1875, the said Aaron Greenwald having been drawn, summoned, and having appeared as aforesaid, and being then competent and qualified in all respects to serve as a grand juror as

9 aforesaid, the name of him, the said Aaron Greenwald, was, without any cause, reason, or authority, whatever, omitted from the pannel of said grand jury, nor was he called at the empanelling of said grand jury or at any time to serve thereon.

And this defendant says that the indictment found herein against him was found by said grand jury, consisting of fifteen persons, without the said Aaron Greenwald being a member thereof, and by no other; that *the*' his defendant was not under arrest, nor had he given bail for his appearance at said court to answer the criminal charge contained in said indictment, or any charge whatever, before said indictment was

found, and this the defendant is ready to verify. Wherefore he prays judgment of the said indictment and that the same may be quashed.

4th. And the said defendant, for a further plea, says that he ought not to answer to or to be tried on said indictment, because he says that the persons acting as a grand jury of this court at the October term, 1875, by whom the said indictment was found, was not a legal grand jury, because he says that Andrew Klopenstine and James Godfrey were drawn, summoned, empanelled, and sworn contrary to law as jurors of said grand jury; that they each acted as a member of said grand jury in finding said indictment; that they were not nor was either of them drawn at the time and place appointed by the judge of the said third district court for the drawing of grand jurors to serve at said term; that the said James Godfrey was drawn afterwards, to wit, on the 11th day of October, 1875, and not at any other time, and the
10 said Andrew Klopenstine was drawn on the 13th day of October, 1875, and not at any other time, to serve as jurors of said grand jury: that no necessity therefor had arisen, nor any necessity, to draw any other or additional grand juror or jurors to serve at said term, either when the said James Godfrey or Andrew Klopenstine was so drawn as aforesaid.

That said George Reynolds, defendant, was not under arrest nor had he given bail for his appearance at said court to answer the criminal charge contained in said indictment, or any charge whatever, before said indictment was found, and this the said George Reynolds is ready to verify. Wherefore he prays judgment of the said indictment and that the same may be quashed.

5th. And the said defendant, for a further plea, says that he ought not to answer to or be tried on said indictment, because he says that the names of the persons who were empanelled and sworn to act as grand jurors at the said October term, 1875, and that found the said indictment, were not drawn from the box containing the names or any names on slips of paper or otherwise of persons that had previously or at any time been selected, prepared, named, or drawn by the judge of probate of the county in which said court was held and by the clerk of said district court, or by any judge of probate or clerk of the district court, or taken from any list of names so selected, prepared, named, or drawn as aforesaid.

That said defendant was not under arrest, nor had he given bail for his appearance at said term of court, to answer the criminal charge contained in said indictment, or any charge whatever, before said
11 indictment was found; and this the defendant is ready to verify. Wherefore he prays judgment of the said indictment that the same may be quashed.

6th. And the said George Reynolds, for a further plea, says that he ought not to be held further to answer said indictment or to be tried thereon, for the reason that he says that the grand jury that found the said indictment had not before the finding thereof been sworn as such grand jury or according to law or otherwise.

That said defendant was not under arrest nor had he given bail for his appearance at said court to answer the criminal charge contained in said indictment, or any charge whatever, before said indictment was found, and this the defendant is ready to verify. Wherefore he prays judgment of the said indictment and that the same may be quashed.

GEORGE REYNOLDS.

WILLIAMS & YOUNG and SHEEKS & RAWLINS,
Attorneys for George Reynolds.

TERRITORY OF UTAH,
Salt Lake County, ss:

George Reynolds, being duly sworn, says that he is the defendant in the foregoing pleas, that he has read and knows the contents of said pleas, and that they are true in substance and matter of fact.

GEORGE REYNOLDS.

12 Subscribed and sworn to before me this 6th day of December, A. D. 1875.

[SEAL.]

JAMES JACK,
Notary Public for Salt Lake County, U. T.

TITLE.

Demurrer to first plea.

And William Carey, who prosecutes for the said United States in this behalf, as to the said plea of the said George Reynolds by him above pleaded, says that the same and the matters therein contained in manner and form as the same are above pleaded and set forth are not sufficient in law to bar or preclude the said United States from prosecuting the said indictment against him, the said George Reynolds, and that the said United States is not bound by the law of the land to answer the same, and this he, the said William Carey, who prosecutes as aforesaid, is ready to verify. Wherefore, for want of a sufficient plea in this behalf, he, the said William Carey, for the said United States, prays judgment and that the said indictment may be adjudged good, and that the said George Reynolds may further answer thereto.

WILLIAM CAREY,
Attorney of the United States for Utah Territory.

13 TITLE.

Replication to second plea.

And hereupon William Carey, attorney of the United States in and for the Territory of Utah, who prosecutes for the said United States in this behalf, says that the said indictment, by reason of anything by the said George Reynolds alleged in his said plea secondly above pleaded, ought not to be quashed, because, he says public notice of the time and place of the drawing of a grand jury was duly and legally given by the judge of the third judicial district of Utah Territory, which public notice is on record in the office of the clerk of said court and is in the words and figures following, to wit:

TERRITORY OF UTAH,
Third Judicial District, ss:

Public notice is hereby given that on Thursday, the 23rd day of September, A. D. 1875, at 11 o'clock a. m. of that day, in the federal courthouse in Salt Lake City, Salt Lake County, Utah Territory, in open session of the district court of the third judicial district of said Territory, there shall be drawn, in the manner prescribed by law, from the jury-list hererofore prepared for the current year by the clerk of said district court and the probate judge of said county of Salt Lake, the names of fifteen persons to serve as grand jurors and the names *to* twenty-four persons to serve as petit jurors at the next October term of said district court, to

be begun and holden at Salt Lake City on the second Monday of October next, the same being the 11th day of said month of October.

14 Witness my hand this 20th day of September, 1875.

JACOB S. BOREMAN,
Judge of the Third District Court of Utah Territory.

And this he, the said William Carey, is ready to verify, wherefore he prays judgment, and that the said George Reynolds may answer to said indictment.

Replication to third plea.

And the said William Carey says that the said indictment, by reason of anything by the said George Reynolds alleged in his said plea by him thirdly above pleaded, ought not to be quashed, because, he says that Aaron Greenwald was, on the 13th day of October, A. D. 1875, and before the empanelling of said grand jury was completed, and before the oath required by law was administered, excused from service on said grand jury on account of the sickness of said Aaron Greenwald; and this he, the said William Carey, is ready to verify. Wherefore he prays judgment, and that the said George Reynolds may answer to said indictment.

Replication to fourth plea.

And the said William Carey says that the said indictment, by reason of anything by the said George Reynolds alleged in his said plea by him fourthly above pleaded, ought not to be quashed, because, he says that the persons acting as a grand jury of this court at the October term, 1875, by whom the said indictment was found, was a legal grand jury; that among the fifteen names drawn to serve as grand jurors at the present October term of said court, on the 23d day of September, A. D. 1875,

in pursuance of the notice given on the 20th day of September,

15 1875, by the judge of said court, was the name of George W. Davis. That before empanelling said grand jury the persons whose names were so drawn as aforesaid were examined on their voir dire as to their several and respective qualifications to serve as jurors of said grand jury, and that on such examination it was ascertained, by the statements of said George W. Davis, to the satisfaction and conviction of the court, that the said George W. Davis was not at that time a citizen of the United States, and so, upon the challenge of the United States district attorney, the said George W. Davis was declared by the court incompetent and not qualified to serve as a juror of said grand jury, and was discharged from further service on said grand jury, and the United States marshal was directed in open court to draw from the list of names for jurors selected by the clerk of the district of the said third judicial district of Utah and the judge of probate of Salt Lake County, in said Territory, the name of a person to fill the vacancy in said grand jury caused by the discharge of said George W. Davis as aforesaid. That the United States marshal did proceed to draw a name, as directed by the court, to fill said vacancy, and thereupon the name of James Godfrey was drawn, and he was summoned, empanelled, and sworn to serve as a juror of said grand jury in place of George W. Davis, discharged as aforesaid. That Aaron Greenwald was drawn to serve as a juror of said grand jury on the 23rd day of September, 1875, and appeared in said court and answered to his name on the 11th day of Octo-

ber, 1875, but before said grand jury was empanelled and sworn, to wit, on the 13th day of October, 1875, said Aaron Greenwald was ex-
16 cused from further attendance and service as a juror of said grand jury, on account of the sickness of said Aaron Greenwald, and the United States marshal was directed, on the day of October, 1875, in open court and before the grand jurors aforesaid were sworn, to draw from the aforesaid list of names, selected as aforesaid, the name of a person to fill the vacancy in said grand jury caused by the discharge of said Aaron Greenwald as aforesaid. That the United States marshal did proceed to draw a name as directed by the court to fill said vacancy caused by discharge of said Aaron Greenwald, and thereupon the name of Andrew Klopenstine was drawn, and he was summoned, empanelled, and sworn to serve as a juror of said grand jury in place of Aaron Greenwald, discharged as aforesaid. That the judge of said court had ordered a grand jury of fifteen persons for said October term of said court. That thirteen of the fifteen persons drawn on the 23d day of September, as ordered by said court, were empanelled and sworn to serve as jurors of said grand jury, and that said James Godfrey and Andrew Klopenstine were empanelled to fill the vacancies on said grand jury as aforesaid; that the grand jury thus empanelled was a legal grand jury; and this the said William Carey is ready to verify. Wherefore he prays judgment, and that the said George Reynolds may answer to said indictment.

Replication to fifth plea.

And the said William Carey says that the said indictment, by reason of anything by the said George Reynolds in his said plea by him fifthly above pleaded, ought not to be quashed, because he says
17 that the said fifth plea is untrue in substance and in fact, because, he says, that on the day of January, A. D. 1875, the clerk of the district court in and for the third judicial district of Utah Territory and the judge of probate of Salt Lake County, in said Territory, did prepare a jury-list from which grand and petit jurors should be drawn to serve in the district court of said third judicial district until a new list should be made by statute of the United States in such case provided; that after such jury-list, so prepared as aforesaid, was made and duly certified to, the clerk of said district court did write the name of each person on said jury-list upon a separate slip of paper, in accordance with the requirements of the statute in such case made and provided; and from said jury-list, so made as aforesaid, and from the names of said persons so selected as aforesaid, which names had been previously written on separate slips of paper as aforesaid and placed in a box, as by law required, the United States marshal did proceed to fairly draw by lot from said box such number of names to serve as jurors at the October term, A. D. 1875, of said court as had previously, to wit, on the 20th day of September, 1875, been directed by the judge of said court; and the said grand jury was exclusively composed of persons selected as aforesaid by said probate judge and the clerk of said district court, and whose names were drawn by lot, as by statute required; and this the said William Carey is ready to verify. Whereupon he prays judgment, and that the said George Reynolds may answer to said indictment.

18 *Replication to sixth plea.*

And the said William Carey says that the said indictment, by reason

of anything by the said George Reynolds in his said plea by him sixthly above pleaded, ought not to be quashed, because, he says, that the grand jurors that found the said indictment, before the finding thereof were not only sworn, but they were duly and legally sworn as such grand jurors; and this the said William Carey is ready to verify. Wherefore he prays judgment, and that the said George Reynolds may answer to said indictment.

WILLIAM CAREY,
Attorney of the United States for the Territory of Utah.

TITLE.

And the said George Reynolds, in his own proper person, says that by reason of anything in the replication of the said United States to the second plea by him therein pleaded, he ought not to answer to or be tried on said indictment, because, he says that the matters and things stated and set forth in said replication are not true in manner and form as therein alleged. And of this said George Reynolds puts himself upon the country.

And the said George Reynolds, in his own proper person, says
19 that by reason of anything in the replication of the said United States to the third plea by him herein pleaded, he ought not to answer to or be tried on said indictment, because, he says, that the matters and things stated and set forth in said replication are not true in manner and form as therein alleged. And of this the said George Reynolds puts himself upon the country.

And the said George Reynolds, in his own proper person, says that by reason of anything in the replication of the said United States to the fourth plea by him herein pleaded, he ought not to answer to or be tried on said indictment, because, he says, the matters and things stated and set forth in said replication are not true in manner and form as therein alleged. And of this the said George Reynolds puts himself upon the country.

And the said George Reynolds, in his own proper person, says that by reason of anything in the replication of the said United States to the fifth plea by him herein pleaded, he ought not to answer to or be tried on said indictment, because, he says, the matters and things stated and set for' in said replication are not true in manner and for' as therein alleged. And of this the said George Reynolds puts himself upon the country.

And the said George Reynolds, in his own proper person, says that by reason of anything in the replication of the said United States to the sixth plea by him herein pleaded, he ought not to answer to or be tried on said indictment, because, he says, that the matters and things stated and set forth in said replication are not true in manner
20 and form as therein alleged. And of this the said George Reynolds puts himself on the country.

GEORGE REYNOLDS.

WILLIAMS & YOUNG and SHEEKS & RAWLINS,
Attorneys for Defendant.

At a district court of the third judicial district of Utah Territory, held at the Federal court-house in Salt Lake County, said Territory, on the 8th day of December, A. D. 1875.

Present, the Hon. Alex. White, judge of said court.

TITLE.

This day comes the United States, by the district attorney, and the defendant in his own proper person, and thereupon the defendant was arraigned in due form of law, and pleaded in abatement to the indictment his six several pleas, marked respectively first, second, third, fourth, fifth, and sixth, and the United S'ates demurred to the first plea, and replied specially, as shown by the record and files, to second, third, fourth, fifth, and sixth pleas—'o each separately; and the defendant rejoined to each of the said several replications; and the said several issues being upon matters of record, the cause was submitted to the court upon the pleadings; and thereupon the court sus-
21 tained the demurrer to the first plea, and found the issues upon the rejoinder to the second, third, fourth, fifth, and sixth pleas in favor of the United States; and the defendant, by leave of the court, filed his plea of not guilty; and thereupon came a jury of good and lawful men, to wit, Charles Read, Henry Simons, Benjamin F. Dewey, Eli Ransohoff, Lucien Livingstone, Edward L. Butterfield, Samuel Woodward, Nathan J. Lang, Frank Cisler, Emanuel Kahn, John S. Barnes, and George Hoggan, who, being empanelled and sworn well and truly to try the issue joined between the United States and the defendant, George Reynolds, who, after hearing the evidence of the witnesses, to wit, John Tuddenham, Mary Tuddenham, Daniel H. Wells, Amos K. Lucas, John R. McBride, George R. Maxwell, Arthur Pratt, J. G. Sutherland, Hamilton Gamble, sworn and examined as witnesses for the plaintiff, Daniel H. Wells, Orson Pratt, sen., John Nicholson, and John Sharp, sworn and examined as witnesses for the defendant, upon their oaths do say: "We, the jurors in the above-entitled cause, find a verdict of guilty against the defendant, as charged in the indictment, and recommend him to the mercy of the court."

At a district court of the third judicial district of Utah Territory, held at the Federal court-house in Salt Lake County, said Territory, on the 21st day of December, A. D. 1875.

Present, the Hon. Alex. White, judge of said court.

22 TITLE.

The defendant in this case having prayed for an appeal, it is ordered by the court, on application of the defendant, that he be allowed, pending the appeal in this case, to give bail, with sufficient sureties, to be approved by the court, in the sum of ten thousand dollars.

TITLE.

In this case the defendant, George Reynolds, having been found guilty, as charged in the indictment, and this day appearing in open court in his own proper person, it is ordered and adjudged by the court that the defendant, George Reynolds, be imprisoned at hard labor for a term of two years, and pay a fine of five hundred dollars.

The defendant thereupon filed his bond on appeal, which was approved by the court.

TITLE.

Bill of exceptions.

Be it remembered that, on the trial of this cause at the October
23 term, A. D. 1875, of said court, the United States, for the purpose of sustaining the issue upon their part on the replication to defendant's second plea in abatement, introduced what purported to be a printed copy of a notice signed by the judge of this court, fixing the time and place for drawing grand and petit jurors for the October term of said court, 1875. There was evidence to show that this notice had been published, and also to show that there had been an original notice, similar to this, written out by said judge; that search had been made in the clerk's office for the original notice, but could not be found. Whereupon A. K. Smith, upon the part of the United States, testified that he had seen the original notice, in the judge's own handwriting, and, being asked by the district attorney if he knew this to be a copy of that original, answered, "I do not; but that an order of that kind was made—was written out—from which this was made, I know."

Ques. Do you know that this is a copy of that?

Ans. I do not.

Ques. What is your best recollection?

Ans. I think it is an exact copy; that is my best recollection. I saw it on the day it was made in court. I was here as marshal.

EDWARD B. MCKEAN sworn upon the part of the United States:

Ques. (By district attorney, the printed notice being exhibited to witness.) "Can you tell whether the original of that notice was in your hand?"

24 Ans. Yes, sir; I had the original. I would not swear that that was an exact copy, because I have not examined it.

After examination the witness testified that according to his best recollection the paper was a copy of the original.

The defendant moved to strike out the above testimony concerning the notice, that the evidence of the notice and of the publication thereof should appear of record, and that parol evidence is inadmissible to supply it; which motion was by the court overruled.

Hereupon the United States offered the said printed notice in evidence to sustain their replication to the said second plea in abatement, to the introduction of which defendant objected on the ground that there was not sufficient evidence of the existence of any original, and also because the record of the court cannot be supplied by parol evidence. The said objection was overruled and the printed notice was received in evidence, to which ruling and to the receiving of which defendant excepted.

And the United States, to maintain upon their part the issue joined upon the replication to defendant's fifth plea in abatement, offered oral evidence of the fact that the jurors were drawn from the box as required by law; which evidence the court received. To all of which evidence the defendant objected on the ground that that fact could only be shown by record evidence; which said objections were overruled, and exceptions to such rulings and to the admission of said evidence were duly taken by the defendant. The record of the proceedings upon the drawing of the grand jury were also introduced to sustain the issues
25 upon the part of the United States made upon the replication to defendant's plea in abatement.

The pleas in abatement being disposed of, and defendant having pleaded not guilty, a jury was called to try the case. Whereupon William A. Bills, being one of the panel and possessing all the statutory qualifications for a juror, was interrogated by the district attorney, and answered as follows:

Ques. Do you know the defendant?
Ans. No, sir.
Ques. Are you living in polygamy?

By the court:

You are not bound to answer that question affirmatively.
JUROR. I don't think proper to answer the question.
COURT. You are bound to answer unless it would criminate yourself.
Ques. (By district attorney.) Are you living in polygamy?
Ans. I refuse to answer it.
Ques. On what grounds?
Ans. I do not wish to criminate myself.
Ques. Do you entertain such opinions on the subject of polygamy that you could not give a fair trial on the evidence that shall be adduced here?
Ans. No, sir; I don't think I do.
Ques. Do you consider it a crime under the law?
Ans. I do.

Hereupon the United States attorney challenged the said William A. Bills for cause. The defendant objected to said challenge being allowed. The court sustained the challenge and the said juror was ex-
26 cused; to which ruling of the court the defendant excepted.

CHARLES READ, being called as a juror, was interrogated and answered as follows:

Ques. (By district attorney.) Have you formed or expressed an opinion as to the guilt or innocence of this charge?
Ans. I believe I have formed an opinion.

By the court:

Have you formed and expressed an opinion?
Ans. No, sir; I believe not.
Ques. You say you have formed an opinion?
Ans. I have.
Ques. Is that based upon evidence?
Ans. Nothing produced in court.
Ques. Would that opinion influence your verdict?
Ans. I don't think it would.

By defendant:

I understood you to say you had formed an opinion, but not expressed it?
Ans. I don't know that I have expressed an opinion. I have formed one.
Ques. Do you now entertain that opinion?
Ans. I do.

Whereupon the defendant challenged the said Charles Read for cause, which challenge was overruled by the court, to which ruling the defendant excepted.

HOMER BROWN, one of the panel of the jury, being called and sworn to answer questions, and, appearing to be qualified in other respects, was

interrogated by the district attorney, and answered as follows upon the subject of polygamy:

Ques. Are you living in polygamy?

27 Ans. I would rather not answer that.

The court instructed the witness that he must answer the question unless it would criminate him.

By district attorney:

You understand the conditions upon which you refuse?

Ans. Yes, sir.

Ques. Have you such an opinion that you could not find a verdict for the commission of that crime?

Ans. I have no opinion on it in this particular case. I think under the evidence and the law I could render a verdict accordingly.

Hereupon the United States challenged the said Homer Brown for favor, which challenge was sustained by the court and the said juror was excused, to which ruling of the court defendant excepted.

ELI RANSOHOFF called as a juror and sworn to answer questions.

Ques. (By district attorney.) Have you formed or expressed an opinion as to the guilt or innocence of the prisoner at the bar?

Ans. I have expressed an opinion by reading the papers with the reports of the trial in.

Ques. Would that opinion influence your verdict in hearing the evidence?

Ans. I don't think it would.

Ques. (By defendant.) You stated you had formed some opinion by reading the reports of the previous trial.

Ans. Yes, sir.

Ques. Is that an impression that remains upon your mind?

Ans. No, I don't think it is. I only glanced over it, as everybody else does.

28 Ques. Do you think you could try the case wholly uninfluenced by anything?

Ans. Yes, sir.

Hereupon defendant challenges the said Eli Ransohoff for cause.

By the court to the juror:

I understood you to say that the opinion you have formed would not influence your verdict on a trial of this kind.

Ans. Yes, sir.

The court thereupon overruled defendant's challenge, to which ruling defendant excepted.

BENJAMIN F. CUMMINGS was called and sworn to answer questions as a juror, and, appearing to be qualified in other respects, was asked as to polygamy by district attorney:

Ques. Have you any conscientious scruples against finding a verdict of guilty for a crime of this nature?

Ans. No, sir.

Ques. Are you living in polygamy?

Ans. Yes, sir, but not in violation of law.

Court. You are living in polygamy, but not in violation of law?

Ans. Yes, sir; what I did in that line was before there was any law in relation to it.

Court. How long ago, M'r Cummings?

Ans. Nineteen years; between nineteen and twenty, if I remember right.

Court. Would that relation bias your verdict in the case of a man charged with bigamy?

Ans. I don't know that it would.

Ques. Do you know that it would not?

Ans. I think it would not.

29 Ques. You can't say clearly whether it would or not?

Ans. It might have some influence.

Hereupon the said United States challenged the said Benjamin F. Cummings for cause, which challenge was sustained by the court, and said Cummings discharged, to which ruling of the court defendant excepted.

JOHN W. SNELL was called as a juror and sworn on his voir dire, and, appearing to be qualified in all other respects to serve as a juror, was asked by the district attorney the following questions about polygamy:

Ques. Are you living in polygamy?

Ans. I decline to answer that question.

Ques. On what grounds?

Ans. It might criminate myself, but I am only a fornicator.

Hereupon the said Snell was challenged by the United States for cause, which said challenge was sustained by the court and the said Snell discharged, to which ruling of the court the defendant excepted.

After the prosecution had introduced on the trial evidence of the first marriage as charged in the indictment, the prosecuting attorney proposed to lay the foundation for proving what one Amelia Jane Schofield had testified to upon a former trial of the same issue now in question between the same parties, but upon another indictment, and thereupon introduced evidence to the court to show that the defendant herein had been once before tried upon an indictment upon this same offense,

30 and that during said trial one Amelia Jane Schofield had testified upon said trial, and the prosecution, claiming that the defendant had kept said witness away from this trial, and that therefore the testimony of said witness upon said former trial was admissable, and to establish the fact that the defendant herein had kept said witness away from this trial, introduced the following evidence:

ARTHUR PRATT, being duly sworn, testified as follows, to wit:

That he is and was at all times herein mentioned a deputy marshal. (Here a subpœna was shown witness, bearing date the day of , 1875, for witnesses in this case, and among other names thereon was the name of Mary Jane Schobold, but no such name as Amelia Jane Schofield.) Witness testified that this subpœna was placed in his hands to be served.

Ques. (Dist. att'y.) M'r Pratt, did you see M'r Reynolds when you went to see Miss Schofield?

Ans. Yes, sir.

Ques. Who did you enquire for?

Ans. I enquired for Mary Jane Schofield, to the best of my knowledge that the name that is on the subpœna. I will state this, that I inserted the name in the subpœna and intended it for the name of the woman examined in this case at the former term of the

court, and enquired for Mary Jane Schofield, or M'r's Reynolds, I do not recollect certainly which.

Ques. State the reply.

Ans. He said she was not at home.

Ques. Did he say anything further?

Ans. I asked him then where I would find her. I said, "Where is she?" And he said, "You will have to find out."

31 Ques. What else did he say? Did he know you to be a deputy marshal?

Ans. Yes, sir.

Ques. Did you tell him what your business was as deputy marshal?

Ans. I don't remember now; I don't think I did.

Ques. What else did he say?

Ans. He said, just as I was leaving, as I understood it, that she did not appear in this case. I made further inquiries for her at different houses and was told——

(Here defendant moved to strike out the testimony of the said Arthur Pratt, for the reason that witness has no subpœna for the witness that it was proposed to prove was concealed or caused not be found.

(The court denied the motion and ordered a subpœna to issue for Amelia Jane Schofield, returnable instanter.)

Upon the following day, at 10 o'clock a. m., the said subpœna for the said witness having issued about 9 o'clock p. m. of the day before, the said Arthur Pratt was again called upon and testified as follows:

Ques. (By district attorney.) State whether you are the officer that had that subpœna in your hands. (Exhibiting subpœna last issued as above set forth.)

Ans. Yes, sir.

Ques. State to the court what efforts you have made to serve it.

Ans. I went to the residence of M'r Reynolds, and a lady was there, his first wife, and she told me that this woman was not there,

32 that that was the only home that she had, but that she hadn't been there for two or three weeks. I went again this morning, and she was not there.

Ques. Do you know anything about her home—where she resides?

Ans. I know where I found her before.

Ques. Where?

Ans. At the same place.

Ques. You are the deputy marshal that executed the process of the court?

Ans. Yes, sir.

Ques. Repeat what M'r Reynolds said to you when you went with the former subpœna introduced last evening.

Ans. I will state that I put her name on the subpœna myself. I know the party and am well acquainted with her, and I intended it for the same party that I subpœn'ed before in this case. He said that she was not in, and that I could get a search-warrant if I wanted to search the house. I said, "Will you tell me where she is?" He said, "No; that will be for you to find out." He said, just as I was leaving the house—I don't remember exactly what it was, but my best recollection is that he said she would not appear in this case.

Ques. Can't you state that more particularly?

Ans. I can't give you the exact words, but I can say that was the purport of them.

Ques. Give the words as nearly as you can.

Ans. Just as I said, I think those were his words.

Ques. Did you hear him distinctly?

33 Ans. I think I did. It has been some time since, but I think those were his words. I would not be positive. I can give my best recollection on that.

Ques. Repeat the words again, as you understood them.

Ans. That she would not appear in this case.

Ques. Give Reynolds' exact words.

Ans. I don't think I could give his exact words on any of our conversations. I am stating it according to my best recollection, knowledge, and belief.

Ques. You were sworn here last night. Didn't you give his words differently last night to what you do this morning?

Ans. I think not.

Ques. Are you positive of the fact?

Ans. I would not swear positively, but that was the tenor of his remarks.

Ques. You say you cannot positively give Reynolds' words?

Ans. I don't think I can; probably I might.

Ques. Tax your memory and state them as nearly as you can.

Ans. That she don't appear in this case.

Ques. Now give the words you used last night.

Ans. To the best of my recollection those are the words that I used last night. I also stated that she was causing me considerable trouble, and that she would get into trouble herself. He said, "Oh, no, she won't, till the subpœna is served on her."

Ques. Did you hear all that was said at that time by M'r Reynolds?

34 Ans. I think I did.

Ques. I will ask you to repeat the words that you used last night as to what M'r Reynolds said to you when you went to him on the prior occasion with that subpœna. Repeat just the words that you used last night.

Ans. When I went there I enquired for the party that I had subpœn'ed once before, and he stated that she was not at home, and that if I wanted to search the house I could get a search-warrant, or I could take his word for it. I told him I presumed I could take his word for it. Then I said, "Do you know where she is, then?" He says that she does not appear in this case. I then stated to him that she was causing me considerable trouble herself. He said, "Oh, no, she won't, not till she gets the subpœna."

Ques. You stated that last night?

Ans. I didn't state the latter part of it.

Ques. I understood you last night to say that he had said something, but you did not understand what he said.

Ans. I stated, to the best of my knowledge and belief, that he said to me that she didn't appear in this case, or words to that effect, but this morning I can swear positively to the other statement I made to him about her getting me into trouble.

Ques. You enquired, I understand, for the person named in the subpœna as it appeared last night—Mary Jane Schofield?

Ans. Mary Jane Schofield, or M'r's Reynolds, the party I subpœn'ed before at the same place.

It appeared that the said Amelia Jane Schofield had not been subpœn'ed to appear at this trial.

35 The above is all the evidence showing or tending to show that the said witness, Amelia Jane, had been kept away or prevented

from being subpœnaed, or from appearing as a witness by said defendant.

Thereupon the court ruled that the prosecution might prove what the said Amelia Jane Schofield testified to upon the former trial, to which ruling the defendant excepted.

Thereupon A. S. PATTERSON was sworn for the prosecution and testified as follows:

Ques. (By prosecuting attorney.) Mr. Patterson, will you read the testimony given in the former trial by Amelia Jane Schofield?

(Defendant objected to the witness's reading such testimony because there had not been any foundation laid for reading the same, and because such evidence was incompetent, which objection was overruled by the court, to which ruling the defendant excepted.)

(Witness reads:) Amelia Jane Reynolds sworn for the prosecution. What is your name? Amelia Jane Reynolds.' What was your name before you were married?' Amelia Jane Schofield. When were you married? On the third day of August, 1874. To whom? Mr. Reynolds. Where? In the endowment-house. You say at the endowment-house in this city? Yes, sir.

(The defendant moved to strike out the evidence so read for the reason that it was in no way connected with the defendant, as it only said Mr. Reynolds. Motion overruled, to which ruling defendant excepted.)

J. R. MCBRIDE was sworn for the prosecution and testified as follows:

36 Ques. (By district attorney.) I will ask you if you heard the testimony of Amelia Jane Schofield at the last trial of this case, of which the notes have been read?

Ans. I was present and saw the lady examined.

Ques. Will you state what the testimony was? Do you remember what it was?

Ans. I think I do.

Ques. (By defendant.) Can you state precisely the words she used?

Ans. I think I can.

By the court:

The court will hold the witness to his best recollection of what she testified.

(Defendant objects to the introduction of this testimony, because, 1st, it is not competent testimony in any event; 2nd, because it is not shown that the witness, Amelia Jane Scofield, is dead; 3rd, because it is not sufficiently shown that the said witness has been kept away from this trial by the defendant; 4th, because the written testimony, as read by the witness Patterson, is the best evidence.

The objections were overruled by the court, to which ruling the defendant excepted.)

Whereupon the witness proceeded and testified as follows:

My recollection is that the witness came on the stand, took a seat, and was first asked what her name was. She stated, Amelia Jane Reynolds. She was then asked when she was married, and she replied, stating the time. I would not be positive about the day, but it was in August, '74, she stated, the previous August to the time she was examined. She was then asked to whom she was married, and my
37 recollection is that she said to George Reynolds. I do not think I am mistaken, using the first name of the defendant.

Ques. I will ask you if you remember anything about her speaking of the prisoner at the bar?

Ans. No, sir; I don't recollect that she did, except that she said George Reynolds, I am not sure of that; that is my best recollection of it.

HAMILTON GAMBLE sworn for the people.

Ques. Were you present at the former trial of this case?

Ans. I was most of the time, sir.

Ques. Were you present when Amelia Jane Schofield, sometimes called Amelia Jane Reynolds, was examined?

Ans. Yes, sir.

Ques. Go on and state what she testified to.

(Objected to on the same ground; objection overruled; exception.)

WITNESS. The witness was asked what her name was. She replied that her name was Amelia Reynolds. Her middle name I have forgotten. She was asked when she was married. She replied in August, naming the day, '74. She was asked to whom, and she replied to Mr. Reynolds. I don't recollect that she gave the first name of her husband, but my recollection is very distinct and clear that the district attorney motioned, indicating the prisoner, and that the witness assented and said that was the man.

Cross-examined:

Ques. You don't remember, you say, that she was asked if this defendant was the man?

38 Ans. That is precisely what I do say, that she was asked by a motion whether that was the man, and she assented.

Defendant moves to strike out so much of that testimony as refers to the motion, on the ground that M'r Gamble could only guess what that motion meant, to wit: That, M'r Gamble, is simply your impression of what was meant by the district attorney, and what she meant by the motion, is it not?

COURT. Wait a moment; I will overrule the objection and let it go to the jury.

(Exception.)

The defendant moved to strike out all the evidence of Amelia Jane Schofield, as given at the former trial, and reproduced at this trial, in the evidence of Patterson, McBride, and Gamble, on the ground that she was incompetent to testify at the former trial, it appearing from her evidence that she was the wife of the defendant, Reynolds. Motion overruled and defendant excepted.

Upon his part the defendant proved by three witnesses, Daniel H. Wells and John Nicholson and Orson Pratt, that it was an accepted doctrine and belief of the Church of Jesus Christ of Latter day Saints, commonly called the Mormon Church, that it was the duty of male members of said church, circumstances admitting, to practsie polygamy; that it was doctrine of said church, accepted by the members thereof; that this duty was enjoined by different books which the members of said church believed to be of divine origin, and among others the Holy Bible, and also that the members of said church believed that

39 the practise of polygamy was directly enjoined upon the male members thereof by the Almighty God, in a revelation to Joseph Smith, the founder and prophet of said church; that the penalty for failing or refusing to practise polygamy by such male members of said church, when circumstances would admit, would be punished, and

that the penalty for such failure or refusal would be damnation in the life to come.

The defendant also proved that he had received permission from the recognized authorities in said church to enter into polygamous marriage; that he is and for twelve years has been a member of said church, and was so at the time the said marriage charged in the indictment is alleged to have been entered into; that, as a member of said church, he had accepted the doctrines and belief thereof, including the belief in the divinity of the injunction to practise polygamy. It was also in evidence that Daniel H. Wells, one having authority in said church to perform the marriage ceremony, married the said defendant on or about the time the crime is alleged to have been committed to some woman by the name of Schofield, and that such marriage ceremony was performed under and pursuant to the said doctrines of the said church.

The defendant asked the court to instruct the jury that—

If the jury find from the evidence that the defendant was married as charged—if he was married—in pursuance of and in conformity with what he believed at the time to be a religious duty, then the verdict must be not guilty. Which instruction the court refused to give. Whereupon defendant excepted to the refusal of the court to give the same.

40 The defendant asked the court to charge the jury, "Unless you find that the defendant committed the offense with a criminal intent, the verdict must be 'not guilty.'"

Whereupon the court, instead of giving the said charge as requested, charged the jury as follows, to wit:

"I charge you, gentlemen, in this case, that there must have been a criminal intent, but that if the defendant, under the influence of a religious belief that it was right—under an inspiration, if you please, that it was right—deliberately married a second time, having a first wife living, the want of consciousness of evil intent—the want of understanding on his part that he was committing a crime—does not excuse him; but the law inexorably in such case implies the criminal intent."

To which instruction the defendant then and there excepted.

The court further charged the jury as follows, to wit:

"I think it not improper, in the discharge of your duties in this case, that you should consider what are to be the consequences to the innocent victims of this delusion. As this contest goes on they multiply, and there are pure minded women and there are innocent children—innocent in a sense even beyond the degree of the innocence of childhood itself. These are to be the sufferers; and as jurors fail to do their duty, and as these cases come up in the Territory of Utah, just so do these victims multiply, and spread themselves over the land."

To which portion of the charge of the court the defendant there and then excepted.

And inasmuch as the matters aforesaid do not appear of rec-
41 ord, the said defendant, by his counsel, tenders this bill of exceptions, and prays that the same may be signed and sealed by the court and made part of the record in said cause.

ALEXANDER WHITE,
Judge.

UNITED STATES OF AMERICA,
Territory of Utah:

Third judicial district. Regular September term, A. D. 1875. Hon. Jacob S. Boreman, judge.

At the regular September term of the district court in and for the third judicial district of the Territory of Utah, begun and held in the federal court-house, in Salt Lake City, on the 23rd day of September, A. D. 1875, at 11 o'clock a. m.

Present, Hon. Jacob S. Boreman, judge.
" George R. Maxwell, U. S. marshal.
" Amos K. Smith, deputy U. S. marshal.
" Edward B. McKean, clerk.
" J. Fred. Corker, bailiff.
" Bowman Cannon, bailiff.
" Lindsay Sprague, bailiff.

Court was opened for business in due form.

In pursuance of an order of the judge of this court heretofore made and dated the 20th day of September, A. D. 1875, on this day in open
42 court, in pursuance of law and in the presence of the judge thereof then presiding, were drawn by the United States marshal, first, the names of fifteen men to serve as grand jurors at the next October term of this court, to wit:

1. Lorenzo Pettit, No. 180.
2. Augustus Podlech, No. 125.
3. Stephen Hunter, No. 14.
4. William R. Jones, No. 110.
5. Daniel W. Rench, No. 171.
6. George W. Davis, No. 92.
7. Jacob Engler, No. 115.
8. Joseph Kirner, No. 131.
9. Horace Bliss, No. 161.
10. Joseph Smith, No. 76.
11. Jacob Moritz, No. 133.
12. Edward Morgan, No. 164.
13. Aaron Greenwald, No. 37.
14. George E. Reid, No. 97.
15. Alfred Lemmon, No. 160.

And, second, the names of twenty-four men to serve as petit jurors at the said October term of this court, to wit:

1. Patrick H. Lamaie, No. 17.
2. Lucien Livingston, No. 165.
3. Charles Reid, No. 49.
4. John A. Jost, No. 183.
5. S. J. Lees, No. 105.
6. David Evans, No. 34.
7. Erasmus D. Ralph, No. 155.
8. James McGuffy, No. 109.
9. Homer Brown, No. 30.
10. William Stoker, No. 175.
11. Henry Wadsworth, No. 65.
12. Alexander Tarbet, No. 61.
43 13. Thomas E. Clohecy, No. 113.
14. William C. Morris, No. 114.
15. John Bunnion, No. 144.

16. David Leaker, No. 62.
17. John W. Snell, No. 48.
18. Charles J. Goodwin, No. 193.
19. Charles A. Woods, No. 71.
20. John Tingey, No. 188.
21. Henry Moore, No. 116.
22. Thomas R. Jones, No. 31.
23. James Johnson, No. 8.
24. Samuel E. May, No. 23.

Whereupon, by order of the court, the clerk issued a venire to the U. S. marshal, directing him to summon the men so drawn as grand jurors, to be and appear at the federal court-house in Salt Lake City, on the 11th day of October, A. D. 1875, at 11 o'clock a. m.

And also a separate venire directing the U. S. marshal to summon the men so drawn as petit jurors, to be and appear at said federal court-house in Salt Lake City, on the 1st day of November, A. D. 1875, at 10 o'clock a. m.

UNITED STATES OF AMERICA,
Territory of Utah:

Third judicial district. Regular October term, A. D. 1875. Hon. Jacob S. Boreman, judge.

At the regular October term of the district court in and for the
44 third judical district of the Territory of Utah, begun and held in the federal court-house in Salt Lake City, on the 11th day of October, A. D. 1875, at 11 o'clock a. m.

Present, Hon. Jacob S. Boreman, judge.
" Wm Carey, U. S. district attorney.
" Amos K. Smith, deputy U. S. marshal.
" Edward B. McKean, clerk.

Court was opened for business in due form.

The United States marshal returned the venire, having served the same by summoning the following persons to serve as grand jurors for the October term of this court, viz:

1. Lorenzo Pettit, No. 180.
2. Augustus Podlech, No. 25.
3. Stephen Hunter, No. 14.
4. William R. Jones, No. 110.
5. Daniel W. Rench, No. 171.
6. George W. Davis, No. 92.
7. Jacob Engler, No. 115.
8. Joseph Kirner, No. 131.
9. Horace Bliss, No. 161.
10. Joseph Smith, No. 76.
11. Jacob Moritz, No. 133.
12. Edward Morgan, No. 164.
13. Aaron Greenwald, No. 37.
14. George E. Reid, No. 97.
15. Alfred Lemmon, No. 160.

The grand jury having been called, and all having answered to their names, was sworn upon their voir dire. And it appearing upon examination that George W. Davis was not a citizen of the United States, the United States district attorney challenged him for cause, which chal-

lenge being sustained he was excused from service as a grand
45 juror. Whereupon the court directed the U. S. marshal to draw from the box a name to fill the panel, and A. K. Smith, deputy U. S. marshal, having in open court drawn the name of Charles Alder, and it being ascertained that he was absent from Salt Lake City, the name of James Godfrey was thereupon drawn. The court ordered that he be summoned to appear at 10 o'clock a. m., October 12th, A. D. 1875

WEDNESDAY, *October 13th*, 1875.

Court met pursuant to adjournment, and was opened for business in due form. Present, the Hon. Jacob S. Boreman, judge, and the officers of the court.

Heretofore, on the 12th day of October, 1875, it appearing to the court that Aaron Greenwald, one of the grand jurors, was ill, his name was placed aside, and in open court, pursuant to the order of the court, A. K. Smith, deputy U. S. marshal, drew from the box the name of Andrew Klopenstine to fill the panel; it was ordered that he be summoned to appear at 10 o'clock a. m., October 13th, 1875.

On this 13th of October, 1875, the grand jury being called, and all answering to their names, and having heretofore been sworn upon their voir dire, the court ordered the clerk to swear the grand jury in chief, whereupon he proceeded to administer the following oath, viz:

"You, the members of this grand jury, and each of you, do solemnly swear that you will faithfully enquire, and true presentment make, of all such matters and things as shall be given you in charge, both under the laws of the United States and of the Territory of Utah; that
46 you will present indictments, by the agreement of at least twelve of your number, against offenders who should be prosecuted.

"The counsel of the people, of your fellows, and your own, you shall keep secret; you shall present no one from envy, hatred, or malice, nor leave any one unpresented for fear, favor, affection, reward, or the hope of reward; but you shall present all things truly as they come to your knowledge, according to the best of your understanding. So help you God."

The following is the grand jury for the October term of the district court of the third judicial district of the Territory of Utah, as sworn and empaneled, viz:

1. Lorenzo Pettit, No. 180.
2. Augustus Podlech, No. 25.
3. Stephen Hunter, No. 14.
4. William R. Jones, No. 110.
5. Daniel W. Reneh, No. 171.
6. Jacob Engler, No. 115.
7. Joseph Kirner, No. 131.
8. Horace Bliss, No. 161.
9. Joseph Smith, No. 76.
10. Jacob Moritz, No. 133.
11. Edward Morgan, No. 164.
12. George E. Reid, No. 97.
13. Alfred Lemmon, No. 160.
14. James Godfrey, No. 170.
15. Andrew Klopenstine, No. 141.

The court having charged the grand jury, then appointed as foreman Horace Bliss, who was sworn according to law.

47 The grand jury then retired to their room under the charge of a sworn bailiff.

SATURDAY, *October 30th*, 1875.

Court met pursuant to adjournment, and was opened for business in due form. Present, the Hon. Jacob S. Boreman, judge, and the officers of the court.

The grand jury came into court, and through their foreman present indictments in seven (7) United States cases, as follows, viz:

Against , for bigamy.

TITLE.

WILLIAM CAREY,
District Attorney of the United States for the Territory of Utah:

DEAR SIR: You are hereby notified that an appeal has been taken from the judgment of said court in said cause to the supreme court of said Territory.

GEORGE REYNOLDS.

WILLIAMS & YOUNG and
SHEEKS & RAWLINS,
Attorneys for Defendant.

SALT LAKE CITY, UTAH,
Dec. 21st, A. D. 1875.

48 TITLE.

Know all men by these presents that we, George Reynolds, as principal, and William H. Hooper and Hiram B. Clawson, as sureties, all residents of the city and county of Salt Lake and Territory of Utah, are held and firmly bound unto the United States of America in the penal sum of ten thousand ($10,000) dollars, for the payment of which, well and truly to be made, we do hereby bind ourselves, one and each of our heirs, administrators, and assigns, jointly and severally, firmly by these presents. Witness our hands and seals this 21st day of December, A. D. 1875.

The condition of the above obligation is that whereas the above-bounden George Reynolds was, at the October term of the district court of the third judicial district of the Territory of Utah, A. D. 1875, convicted upon an indictment for bigamy, and sentenced to imprisonment for two years in the Detroit house of correction at Detroit, Michigan, and to pay a fine of five hundred dollars to the said United States; and whereas the said George Reynolds has taken an appeal from the said judgment to the supreme court of the said Territory of Utah: Now, therefore, if he, the said George Reynolds, shall abide the judg-
49 ment of the said supreme court upon the said appeal, then this bond shall be void; but otherwise to remain in full force and virtue.

GEORGE REYNOLDS. [SEAL.]
W. H. HOOPER. [SEAL.]
H. B. CLAWSON. [SEAL.]

Approved Dec. 21st, 1875.

ALEXANDER WHITE,
Judge.

TERRITORY OF UTAH,
County of Salt Lake, ss:

William H. Hooper and Hiram B. Clawson, being first duly sworn, each for himself upon his oath says that he is a resident and freeholder in said county, and that he is worth the sum of ten thousand dollars over and above his debts, liabilities, and property exempt from execution.

W. H. HOOPER.
H. B. CLAWSON.

Sworn to and subscribed before me this 21st of Dec., 1875.

ALEXANDER WHITE,
Judge, &c.

Filed Dec. 21, 1875.

WM H. BETTS, *Clerk.*

WILLIS P. MCBRIDE,
Deputy Clerk.

50 TERRITORY OF UTAH,
County of Salt Lake:

I, William H. Betts, clerk of the district court of the 3rd judicial district of the Territory of Utah, do hereby certify that the foregoing are correct, full, and true copies of the pleadings and action of the court thereon—proceedings on the trial, verdict, judgment, bill of exceptions settled, by the judge on the request of the parties in the above-entitled cause, together with the records of the court, in the proceeding of drawing, selecting, and empannelling the grand jury, and of the proceedings of the grand jury in presenting to the court the bill of indictment against the appellant; also the notice of appeal, bond on appeal, and orders staying proceedings pending such appeal in the above-entitled cause. All of which I certify to the supreme court of said Territory for the purposes of said appeal.

In witness whereof I have hereunto set my hand and affixed the seal of said court this 14th day of March, A. D. 1876.

[SEAL.] WM H. BETTS, *Clerk,*
By WILLIS P. MCBRIDE, *Dep'ty Clerk.*

51 (Endorsed:) In the sup. court, Territory of Utah. The United States vs. George Reynolds. Indictment for bigamy. Record on appeal from the third judicial district court of the Territory of Utah. Filed in office clerk of the supreme court March 15th, A. D. 1876. Chas. A. Gould, clerk. By R. A. Waddill, dep'ty clerk.

52 TERRITORY OF UTAH,
County of Salt Lake, ss:

In the supreme court.

THE UNITED STATES, RESPONDENTS,
vs.
GEORGE REYNOLDS, APPELLANT. } Appeal from 3rd district court.

Afterwards, to wit, on the 13th day of June, A. D. 1876, said cause came on to be heard on the transcript of record from the district court. Counsel appearing for both parties.

Whereupon, after argument by counsel, the cause was submitted to the court, and held under advisement until the 6th day of July, A. D. 1876, when the court made the following order:

Ordered and adjudged, that the judgment of the court below be, and the same is hereby, affirmed, with costs.

53 In the supreme court of Utah Territory, June term, 1876.

THE UNITED STATES, RESPONDENT, *vs.* GEORGE REYNOLDS, APPELLANT. } Appeal from the 3d district court.

BOREMAN, justice, delivered the opinion of the court:

The defendant was indicted for the crime of bigamy or polygamy, found guilty and sentenced to imprisonment in the penetentiary and to pay a fine. He appeals to this court.

The defendent filed his various pleas in abatement. The first plea raised the question of the proper number to constitute a grand jury, it being contended by the defendant that it should have been com-
54 posed of any number from sixteen to twenty-three, and not of the number of fifteen members. This question has been heretofore, at a former term, decided by this court in the matter of indictment of this very defendant for this very crime. It was upon the hearing of that case at that time, in this court, strenuously contended by the defendant that fifteen was the proper number to constitute a grand jury, and in that view this court coincided.

He now comes into court, when an indictment has been found against him by a grand jury formed in accordance with that ruling, and says that such a grand jury, consisting of fifteen members, is illegal. The court cannot have much respect for his sincerity of purpose in his pursuing a course deemed very reprehensible.

The action of the court below upon the second plea was proper. The drawing of the grand jury was in pursuance of the order of the judge made therefore, and, the court being one of general jurisdiction, it is presumed, nothing to the contrary having been shown, that it
55 acted correctly and in accordance with law. The proof, however, which we do not think it was necessary to make, shows affirmatively that all of the requirements of the law were strictly complied with. The law requires the judge to give public notice of the intended drawing. It was not necessary that this should have been published in a newspaper, but it was done in this case. The notice was certainly sufficient, as all that the law requires is a public notice by the judge.

It is alleged as error that the court below sustained the challenge of prosecution to the several jurors who appeared to be otherwise qualified, but who refused to answer a question tending to criminate themselves. The question asked was as follows: "Are you living in polygamy?" The court cautioned the jurors that they need not answer if the answer would tend to criminate them. They declined upon that ground to answer. The inevitable conclusion is that these jurors were guilty of the crime of polygamy. This is not like asking a juror on a trial for larceny
56 whether he had ever stolen anything, or, on a trial for murder, if he had ever committed murder. The question is not, "Did you ever commit the crime of polygamy?" but it it was, "Are you now doing so?" They virtually admit that they are. Would such men make impartial jurors? Impartial jurors are such as the law requires, and men cannot be such it they are at that very moment practising the same crime as that charged upon the prisoner. A murderer will never be convicted if those engaged in committing murder are the jurors—they cannot be impartial. And it was not necessary that the disqualification

of the jurors should be shown by extrinsic evidence when they in effect admitted it themselves.

The refusal of the court below to sustain the defendant's challenge to the juror Charles Reade, is assigned for error.

The juror said that he had formed an opinion as to the guilt or innocence of the accused, but he did not think that opinion was such
57 as to influence his verdict. There was nothing shown either by the juror or by extrinsic testimony to give the court any idea of the character or nature of the opinion. The court therefore took the juror's statement as true, that the "Opinion was not such as to influence his verdict." The opinion may have been from indefinite rumor and amounted to nothing above a vague supposition. It would have been very easy to have asked the character or nature of the opinion. It not having been done, we can see no error in the acceptance of the juror by the court.

The record sufficiently shows the finding of the indictment. The endorsement shows it clearly. It would have been improper for the record-book to have disclosed the name of the defendant, as he was not then under arrest.

A witness named Amelia J. Scofield had given testimony upon the former trial of the defendant for this same crime. But when this trial of the case at bar came off, she could not be found. She was a resident at the house of the defendant, but when sought there by the officer
58 it was said that she was not at home. Defendant told the officer that she would not appear in this case, and he refused to tell where she was. It is true that the defendant was not required by law to aid the prosecution in supplying witnesses against himself, but in his effort to avail himself of such right he went to the extent of showing that he was favoring and aiding in her concealment and endeavoring to thwart the efforts of the officers of the law to procure her presence as a witness.

In such a case he has no right to complain if the court allows the next best evidence to be introduced and the proof of her former testimony to go to the jury. On the former trial she was under oath and subject to cross examination by defendant and then he was confronted by the witness. The main objects of producing the witness upon the stand had been attained, and no rights of his were violated by the proof on this trial of her testimony upon the former trial.

59 There was no error in the refusal of the court below to strike out the testimony of Hamilton Gamble. It is not an uncommon practice for attorneys in identifying a party, to point to him and ask the witness whether that is the man referred to, especially when the witness is unfriendly to the side upon which she is called to testify.

The last alleged error assigned by the defendant was respecting a portion of the instructions to the jury, it being claimed by the defence that the court was wrong in telling the jury that they "should consider what are to be the consequence to the innocent victims of this delusion, &c." There is nothing whatever in this language to warrant the supposition that the jury might believe that they could convict upon anything but the proofs of the facts. We are unable to comprehend in the language thus objected to anything beyond a caution to the jury to give earnest and careful consideration to the case. It is of a like na-
60 ture with a caution sometimes given to a jury to remember their oath and such like matters. There was, therefore, no impropriety in the language used by the court, but it was in all respects proper, especially when we remember that some of the jurors might

have been supposed to be of opinion that this was not a great crime, the doctrine that polygamy is right having been shamelessly preached and proclaimed and practiced in this Territory from its first settlement to the present time, in defiance of the statute of the United States against the crime, and, especially, too, when we remember that this crime has a blighting and blasting influence upon the con'ciences of all whom it touches, as is every day and everywhere witnessed throughout this Territory.

Upon the whole case, therefore, we can perceive that no error was committed in the court below.

It is therefore ordered that the judgment of the court below be affirmed.

Other judges concur.

61 (Endorsed:) In supreme court, June term, 1876. United States vs. George Reynolds. Opinion of court. J. Boreman, justice. Filed July 6th, A. D. 1876. Cha's A. Gould, clerk, by H. A. Gould, dep'ty clerk.

62 The United States of America to the United States, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Utah Territory, wherein George Reynolds is plaintiff in error and the United States is defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the honorable Michael Shaffer, chief justice of the supreme court of Utah Territory, this 1 day of July, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.] MICHAEL SCHAEFFER.
Chief Justice of the Supreme Court of Ter'y of Utah.

63 TERRITORY OF UTAH,
County of Salt Lake, ss:

On this 11th day of July, A. D. 1876, personally appeared Joseph L. Rawlins, attorney for George Reynolds, before me, the subscriber, the chief justice of the supreme court of Utah Territory, and makes oath that he delivered a true copy of the foregoing citation to Sumner Howard, the district attorney of the United States for the Territory of Utah.

M. SCHAEFFER,
Chief Justice of Territory of Utah.

(Indorsed:) In Supreme Court of United States. George Reynolds, pl'f in error, vs. United States, d'f't in error. Citation. Filed in office of clerk of sup. court, July 12th, A. D. 1876. Cha's A. Gould, clerk, by H. A. Gould, dep'ty cl'k.

64 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the supreme court of the Territory of Utah, greeting:

Because in the record and proceedings, as also in the rendition of the

judgement of a plea which is in the said supreme court before you, between the United States and George Reynolds, a manifest error hath happened to the great damage of the said George Reynolds, as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the said Supreme Court, to be then and there held; that the record and pro-
65 ceedings aforesaid being inspected, the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the laws of the United States should be done.

Witness the honorable Morrison R. Wait, Chief Justice of the said Supreme Court of the United States, the 7th day of July, in the year of our Lord one thousand eight hundred and seventy five.

[SEAL.]

CHARLES A. GOULD,
Clerk of the said Supreme Court of the Territory of Utah,
By H. A. GOULD,
Deputy Clerk.

65½ (Indorsed:) In Supreme Court of the United States. George Reynolds, pl'f in error, vs. The United States, d'f't in error. Writ of error. Filed in office of clerk of sup. court U. T., July 10th, A. D. 1876. Cha's A. Gould, clerk, by H. A. Gould, dep'ty clerk.

66 TERRITORY OF UTAH,
County of Salt Lake, ss:

Supreme court.

Afterwards, to wit, on the 15th day of August, A. D. 1876, came the appellant, George Reynolds, by his attorneys, Williams and Young, and Sheeks and Rawlins, and E. D. Hoge, and filed in the office of the clerk of said supreme court of Utah Territory an assignment of errors, which is in the words and figures as follows:

In the Supreme Court of the United States.

GEORGE REYNOLDS, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES, DEFENDANTS IN ERROR.

The said plaintiff in error assigns the following errors committed by the supreme court of the Territory of Utah in affirming the judg-
67 ment of the district court of the third judicial district of said Territory in this case, for the reasons following, to wit:

1st. The said district court erred in sustaining the demur'er to the first plea in abatement pleaded to the said indictment by the said plaintiff in error.

2nd. The said district court erred in finding the issues upon the rejoinder to the second, third, fourth, fifth, and sixth pleas pleaded by the said plaintiff in error to said indictment in favor of the United States and against the said plaintiff in error.

3rd. The said district court erred in overruling the objection of said plaintiff in error to receiving the printed copy of a notice of the time and place of drawing grand and petit jurors in evidence to sustain the replication to the second plea in abatement pleaded to said indictment by said plaintiff in error, and in admitting the same in evidence.

68 4th. The said district court erred in admitting oral evidence of the fact that the jurors were drawn from the box as required by law to sustain the issue joined upon the replication to the fifth plea in abatement pleaded by the said plaintiff in error to said indictment.

Fifth. The said district court erred in sustaining the challenge upon the part of the defendant in error to the juror William A. Bills.

6th. The said district court erred in overruling the challenge of the plaintiff in error to the juror Charles Read.

7th. The said district court erred in sustaining the challenge on the part of the defendant in error to the juror Homer Brown.

8th. The said court erred in overruling the challenge of the plaintiff in error to the juror Eli Ramsohoff.

69 9th. The said court erred in sustaining the challenge on the part of the defendant in error to the juror Benjamin F. Cummings.

10th. The said court erred in sustaining the challenge on the part of the defendant in error to the juror John W. Snell.

11th. The said court erred in ruling that the defendant in error might prove what Amelia Jane Schofield testified to at the former trial.

12th. The said court erred in overruling the objection of the plaintiff in error to the reading by A. S. Patterson of the testimony given in the former trial by Amelia Jane Schofield, and in permitting the same to be read to the jury.

13th. The said court erred in overruling the motion of plaintiff in error to strike out the evidence read by the witness A. S. Patterson.

14th. The said court erred in overruling the objection of the

70 plaintiff in error to the introduction of the testimony of the witness J. R. McBride, and in admitting his testimony.

15th. The said court erred in overruling the motion of the plaintiff in error to strike out that portion of the testimony of the witness Hamilton Gamble which he did move to strike out.

16th. The said court erred in overruling the motion of the plaintiff in error to strike out all the evidence of Amelia Jane Schofield, as given at the former trial of this cause, in the evidence of the witnesses Patterson, McBride, and Gamble, and in refusing to strike out the same.

17th. The said court erred in refusing to charge the jury, as requested by the plaintiff in error, concerning his belief as to such marriage being a religious duty.

18th. The said court erred in refusing to charge the jury, as requested by the plaintiff in error, concerning the criminal intent.

71 19th. The said court erred in giving the charge it did to the jury that the law in such cases implies criminal intent.

20th. The said court erred in that portion of the charge given to the jury and excepted to by the plaintiff in error, wherein the jury are charged that they "should consider what are to be the consequences to the innocent victims of this delusion," &c.

21st. The said court erred in pronouncing judgment in said cause, for that the record of said cause does not show that the indictment therein was returned and presented by the grand jury in open court.

The plaintiff in error, therefore, prays that the said judgment of the supreme court of the Territory of Utah may be reversed, and that a mandate may issue from this court, directing the said supreme
72 court of the said Territory to reverse the judgment of the said district court, and to direct the said district court to quash the said indictment.

E. D. HOGE,
Att'y for Plaintiff in Error.

(Endorsed:) Assignment of errors. United States vs. Geo. Reynolds. Filed in the office of the clerk of the supreme court of Utah Ter. Aug. 15th, A. D. 1876. E. T. Sprague, clerk.

73 UNITED STATES OF AMERICA,
Territory of Utah:

Supreme court.

I, Ezra T. Sprague, clerk of the supreme court of the Territory of Utah, do hereby certify that, in obedience to the commands of the writ of error hereto attached, I return said original writ, with the original citation therein issued, containing the acknowledgment of service therein endorsed; and I further certify that the foregoing is a full, true, and correct copy of the papers, records, and proceedings in this cause on file and of record in my office, and a true copy of the original opinion and assignment of errors, also on file in my office.

In testimony hereof I have hereunto set my hand and affixed the seal of said court, in Salt Lake City, in said Territory, this 15th day of August, A. D. 1876.

[SEAL.] E. T. SPRAGUE, *Clerk.*

(Indorsement on cover:) No. 455. George Reynolds, plaintiff in error, vs. The United States. Utah Terr'y sup. c't. Filed 4th October, 1876.

IN THE

SUPREME COURT

Of the United States.

GEORGE REYNOLDS,
Plaintiff in Error,

vs.

THE UNITED STATES,
Defendant in Error.

October Sessions, 1876.

No. 180.

BRIEF OF PLAINTIFF IN ERROR.

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BEN SHEEKS,
GEORGE W. BIDDLE,
For Plaintiff in Error.

In the Supreme Court of the United States.

Writ of error to the Supreme Court of the Territory of Utah.

GEORGE REYNOLDS,
Plaintiff in Error,

vs.

THE UNITED STATES,
Defendant in Error.

October Sessions, 1876.

No. 180.

HISTORY OF THE CASE.

This was an indictment in the District Court for the Territory of Utah against the prisoner, George Reynolds, for having married one Amelia Jane Schofield, the said defendant being then already married to Mary Ann Tuddenham. The indictment was under Section 5352 of the Revised Statutes.*

(*See Revised Statutes of the United States, page 1044.)

"Section 5352. Every person having a husband or wife living who marries "another, whether married or single, in a Territory or other place over "which the United States have exclusive jurisdiction, is guilty of bigamy, "and shall be punished by a fine of not more than five hundred dollars "and by imprisonment for a term of not more than five years; but this "section shall not extend to any person by reason of any former marriage "whose husband or wife by such marriage is absent for five successive "years, and is not known to such person to be living; nor to any person "by reason of any former marriage which has been dissolved by the decree "of a competent Court; nor to any person by reason of any former "marriage which has been pronounced void by the decree of a competent "Court on the ground of nullity of the marriage contract."

The defendant pleaded in abatement to the indictment (see Record, page 3) that the persons acting as a grand jury, by whom the indictment was found, were not a legal grand jury, because fifteen persons, and no more, were empanelled and sworn to serve as a grand jury in the term of the Court in which the indictment was found.

By an Act passed by the Territorial Legislature of Utah, February 18th, 1870, it was enacted that the Court should empanel fifteen men to serve as a grand jury.*

By Section 808 of the Revised Statutes of the United States,† it is enacted that every grand jury empanelled before any District or Circuit Court shall consist of not less than sixteen persons.

The Court below overruled the plaintiff's plea in abatement, on the ground that the grand jury should be empanelled in the method pointed out by the Territorial Legislature, and not in accordance with the practice of the United States Courts.

It is submitted that the Court below erred in this, because while it is true that where a right is given or a crime prohibited by a Territorial Statute, the Territorial Legislature has undoubtedly the right to prescribe the mode of procedure, yet that in cases arising under Federal Statutes, the Territorial Court must proceed in accordance with the practice of the Federal Courts, and should not follow in such cases the procedure marked out by the Territorial Legislature. This point is the first point in the printed brief.

After the Court below had overruled the plea in abatement, the case proceeded to trial. Several jurors were ex-

* See Compiled Laws of Utah, edition of 1876, page 357, Section 4. "The "Court shall empanel, out of the list summoned as grand jurors, fifteen "eligible men to serve as a grand jury."

† Infra, p.

amined on *voir dire* by the District Attorney. Among these a juror, named Eli Ransohoff, was examined on *voir dire*, and in answer to a question by the District Attorney, said: "Q. Have you formed or expressed an opinion as to the "guilt or innocence of the prisoner at the bar? A. I have "expressed an opinion by reading the papers with the re- "ports of the trial. Q. Would that opinion influence your "verdict in hearing the evidence? A. I don't think it "would. *By the defendant.* You stated you had formed "some opinion by reading the reports of the previous trial? "A. Yes, sir. Q. Is that an impression that still remains "upon your mind? A. No; I don't think it does; I only "glanced over it, as everybody else does. Q. Do you "think you could try the case wholly uninfluenced by any- "thing? A. Yes, sir."

Charles Read, when he was called as a juror, was also asked by the District Attorney, "Q. "Have you formed "or expressed any opinion as to the guilt or innocence "of this charge? A. I believe I have formed an opinion. "*By the Court*—Have you formed and expressed an opinion? "A. No, sir; I believe not. Q. You say you have formed "an opinion? A. I have. Q. Is that based upon evi- "dence? A. Nothing produced in Court. Q. Would "that opinion influence your verdict? A. I don't think "it would. Q. *By defendant*—I understood you to say "that you had formed an opinion, but not expressed it. A. "I don't know that I have expressed an opinion; I have "formed one. Q. Do you now entertain that opinion. A. I "do." The defendant challenged each of these jurors for cause, and the Court overruled the defendant's challenge to each of them, and these jurors were permitted to be sworn, and sat upon the jury, which rendered a verdict of guilty against the prisoner. The defendant at the time excepted to the overruling of his challenges by the Court, and assigns it

as error. This point is the second point in the printed brief.

The Court also, when Homer Brown was called from the general panel to serve on the petit jury, allowed the District Attorney to ask him the following questions: "Q. Are you "living in polygamy? A. I would rather not answer that. "The Court instructed the witness that he must answer the "question unless it would criminate him. By the District "Attorney: You understand the conditions upon which you "refuse? A. Yes sir. Q. Have you such an opinion that "you could not find a verdict for the commission of that "crime? A. I have no opinion on it in this particular case. "I think under the evidence and the law I could render a "verdict accordingly." Whereupon the United States challenged the said Homer Brown for favor, which challenge was sustained by the Court, and the said juror was excused, to which ruling of the Court the defendant excepted.

John W. Snell, also a juror, otherwise qualified, was asked by the District Attorney on *voir dire*: "Q. Are you living in "polygamy? A. I decline to answer that question. Q. On "what ground? A. It might criminate myself, but I am "only a fornicator." Whereupon Snell was challenged by the United States for cause, which challenge was sustained. These questions were excepted to by the defendant, who also excepted to the Court sustaining the challenge of the said juror. This action of the Court below is assigned as error on the well established ground that a juror cannot himself be examined as to any matter which tends to shame, crime or infamy; but that such matters must, if true, be proved by some other witness. This forms the subject of the third point in the printed brief.

After the trial was commenced, the prosecuting attorney proceeded to give evidence that the defendant George Rey-

nolds had been married on a certain day to Mary Ann Tuddenham. After this proof had been given, he then offered to prove a second marriage to another person, viz.: one *Amelia Jane Schofield* during the lifetime of Mary Ann Tuddenham, the first wife. There was no witness in Court who could prove the second marriage. *Amelia Jane Schofield* was not in Court. The Prosecuting Attorney then called Arthur Pratt, a deputy marshal, who it was supposed had a subpœna directed to *Amelia Jane Schofield*. When Arthur Pratt was sworn and the subpœna examined, it turned out that no such name as *Amelia Jane Schofield* was on it, but only the name of (see page 14 of Record), *Mary Jane Schobold*, and no other name. He testified that he asked for *Mary Jane Schofield* or Mrs. Reynolds when he went to serve this subpœna, he could not recollect which. He said the defendant had said that she was not at home, and that when he asked the defendant where he could find her, he said "You will have to find out." He also added that he had understood him to say "that she did not appear in "this case." On being cross-examined, however, he could not swear positively to this latter statement having been made. His whole testimony is printed in the argument, under the fourth point,* in small type, as a foot-note. The Court, finding that no subpœna had been taken out for *Amelia Jane Schofield*, ordered a new subpœna to issue for *Amelia Jane Schofield*, returnable instanter (see Record, page 15). This subpœna issued about 9 P. M., and at 10 the following morning the same witness was called up, and the *last subpœna* being shown him, he was asked to state to the Court what effort he had made to serve it. He answered, "I went to "the residence of Mr. Reynolds, and the lady was there, his "first wife, and she told me that this woman was not there;

* See page 39 of Brief.

"that that was the only home she had, but that she had not "been there for two or three weeks. I went there again this "morning, and she was not there. Q. Do you know any- "thing about her home where she resides? A. I know "where I found her before. Q. Where? A. At the same "place."

On this testimony the District Attorney asked leave of the Court to read what *Amelia Jane Schofield* had testified to on a trial of another indictment against this defendant, which he alleged was a trial for bigamy with this same woman. No proof was offered of what the former indictment contained, or what was the issue thereon. The ground on which the District Attorney, by the Bill of Exceptions, appears to have claimed that this testimony was admissible was that it appeared that the witness, *Amelia Jane Schofield*, had been kept away from attending the Court by the defendant, but no proof whatever, other than what is here stated, was offered to show this. Upon this ground the Court decided that the testimony was admissible.

Thereupon the District Attorney called one A. S. Patterson and asked him to read the testimony of *Amelia Jane Schofield* on the former trial. Mr. Patterson then read from a paper a number of statements material to the issue of the indictment under trial, tending to show a marriage by the defendant with *Amelia Jane Schofield*. Mr. Patterson was not asked what the paper was that he held in his hand, whether he had any knowledge of it or of its authenticity or accuracy, or whether he had, of his own knowledge, any recollection of the facts which he read from it. Notwithstanding this, the Court admitted this testimony to be read to the jury, to which the defendant excepted. This point is the fourth point in the printed brief.

The Court, in summing up to the jury, declined to in-

struct them, as requested by the defendant, that if they found that the defendant was married in pursuance of and conformity with what he believed at the time to be a religious duty, their verdict should be "not guilty," and instructed them that if the defendant, under the influence of a religious belief that it was right, deliberately married a second time, having a first wife living, the want of consciousness of evil intent—the want of understanding on his part that he was committing crime, does not excuse him, but the law inexorably, in such cases, implies criminal intent.

It is alleged by the defendant that these instructions were erroneous. This is the fifth point in the printed brief.

The Court also at the end of their charge to the jury, said: "I think it not improper in the discharge of your duties in "this case, that you should consider what are to be the con- "sequences to the innocent victims of this delusion. As this "contest goes on they multiply, and there are pure minded "women—there are innocent children—innocent in a sense "even beyond the degree of the innocence of childhood itself. "These are to be the sufferers; and as jurors fail to do their "duty, and as these cases come up in the Territory, just so "do these victims multiply and spread themselves over the "land."

This part of the charge was excepted to by the prisoner as being entirely outside of the issue to be tried, and as being an improper expression, by the Judge, of private opinion, unwarranted by the testimony in the case. This is made the subject of the sixth and last point presented in the printed brief.

This case came up to the Supreme Court of the Territory of Utah on appeal taken by the defendant from the District Court of the Territory. The specifications of error assigned to the judgment of the District Court were overruled and the

judgment affirmed. Under the Act of Congress of June 23, 1874 (Statutes at Large, 1874, p. 254), giving a writ of error in a case like the present, this case is now brought by writ of error into the Supreme Court of the United States. The error assigned is, that the Supreme Court of the Territory erred in affirming the judgment of the District Court in regard to the errors assigned to its judgment. It has been found convenient to discuss the case in this Court under the different points in which it is alleged that the District Court erred in its several rulings.

SPECIFICATIONS OF ERROR.

See Record, page 28.

I. The said plaintiff in error assigns the following errors committed by the Supreme Court of the Territory of Utah, in affirming the judgment of the District Court of the Third Judicial District of said Territory in this case, for the reasons following, to wit:—

1st. The said District Court erred in sustaining the demurrer to the first plea in abatement pleaded to the said indictment by the said plaintiff in error.

2d. The said District Court erred in finding the issues upon the rejoinder to the 2d, 3d, 4th, 5th and 6th pleas pleaded by the said plaintiff in error to said indictment in favor of the United States against the said plaintiff in error.

3d. The said District Court erred in overruling the objection of said plaintiff in error to receiving the printed copy of a notice of the time and place of drawing grand and petit juries in evidence to sustain the replication to the second plea in abatement pleaded to said indictment by said plaintiff in error, and in admitting the same in evidence.

4th. The said District Court erred in admitting oral evidence of the fact that the jurors were drawn from the box as required by law, to sustain the issue joined upon the replication to the fifth plea in abatement pleaded by the said plaintiff in error to said indictment.

5th. The said District Court erred in sustaining the challenge upon the part of the defendant in error to the juror William A. Bills.

6th. The said District Court erred in overruling the challenge of the plaintiff in error to the juror Charles Reade.

7th. The said District Court erred in sustaining the challenge on the part of the defendant in error to the juror Homer Brown.

8th. The said Court erred in overruling the challenge of the plaintiff in error to the juror Eli Ramsohoff.

9th. The said Court erred in sustaining the challenge on the part of the defendant in error to the juror Benjamin F. Cummings.

10th. The said Court erred in sustaining the challenge on the part of the defendant in error to the juror John W. Snell.

11th. The said Court erred in ruling that the defendant in error might prove what Amelia Jane Schofield testified to at the former trial.

12th. The said Court erred in overruling the objection of the plaintiff in error to the reading by A. S. Patterson of the testimony given in the former trial by Amelia Jane Schofield, and in permitting the same to be read to the jury.

13th. The said Court erred in overruling the motion of plaintiff in error to strike out the evidence read by the witness A. S. Patterson.

judgment affirmed. Under the Act of Congress of June 23, 1874 (Statutes at Large, 1874, p. 254), giving a writ of error in a case like the present, this case is now brought by writ of error into the Supreme Court of the United States. The error assigned is, that the Supreme Court of the Territory erred in affirming the judgment of the District Court in regard to the errors assigned to its judgment. It has been found convenient to discuss the case in this Court under the different points in which it is alleged that the District Court erred in its several rulings.

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13th. The said Court erred in overruling the motion of plaintiff in error to strike out the evidence read by the witness A. S. Patterson.

14th. The said Court erred in overruling the objection of the plaintiff in error to the introduction of the testimony of the witness J. R. McBride, and in admitting his testimony.

15th. The said Court erred in overruling the motion of the plaintiff in error to strike out that portion of the testimony of the witness Hamilton Gamble, which he did move to strike out.

16th. The said Court erred in overruling the motion of the plaintiff in error to strike out all the evidence of Amelia Jane Schofield, as given at the former trial of this cause, in the evidence of the witnesses Patterson, McBride, and Gamble, and in refusing to strike out the same.

17th. The said Court erred in refusing to charge the jury, as requested by the plaintiff in error, concerning his belief as to such marriage being a religious duty.

18th. The said Court erred in refusing to charge the jury, as requested by the plaintiff in error, concerning the criminal intent.

19th. The said Court erred in giving the charge it did to the jury that the law in such cases implies criminal intent.

20th. The said Court erred in that portion of the charge given to the jury and excepted to by the plaintiff in error, wherein the jury are charged that they "should consider "what are to be the consequences to the innocent victims of "this delusion," &c.

21st. The said Court erred in pronouncing judgment in said cause, for that the record of said cause does not show that the indictment therein was returned and presented by the grand jury in open Court.

BRIEF OF ARGUMENT.

FIRST POINT.

The Court erred in allowing a true bill to be found against the prisoner by a grand jury composed of less than sixteen men.

This point relates to the first assignment of error, viz.

"The said District Court erred in sustaining the demurrer to the first plea in abatement pleaded to the said indictment by the said plaintiff in error."

The Legislature of Utah in 1870, (*) passed an Act requiring the number of grand jurors impanelled in any case to be fifteen. It is conceded that in proceedings based on the common law or on statutes of the Territory, this statute would be binding. But this indictment is under Section 5352 (†) of the Revised Statutes of the United States. The District Court, on an indictment under a Federal statute, is bound to proceed only in accordance with the practice of the United States Courts elsewhere, whose jurisdiction is conferred upon it. But every grand jury of the Circuit or District Courts of the United States, must consist of not less

*Act of February 1st, 1870, compiled laws of Utah, p. 357 (1888) Sec. 4. The Court shall impanel out of the list summoned as grand jurors, fifteen eligible men to serve as a grand jury.

†Sec. 5352. Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty of bigamy, and shall be punished by a fine of not more than five hundred dollars, and by imprisonment for a term of not more than five years; but this section shall not extend to any person, by reason of any former

than sixteen persons, (*) whereas the record shows that the indictment in the present case was found by a jury consisting of only fifteen.

The jurisdiction of the United States Territorial District Courts is two-fold. That directly conferred by Act of Congress vests in each of these Courts the same jurisdiction in all cases arising under the Constitution and laws of the United States as is vested in the Circuit and District Courts of the United States. (†) But the legislative power of every Territory by Act of Congress extends to all rightful subjects of legislation. (‡) Under this language and that of

marriage, whose husband or wife by such marriage is absent for five successive years, and is not known to such person to be living; nor to any person by reason of any former marriage which has been dissolved by the decree of a competent Court; nor to any person by reason of a former marriage which has been pronounced void by the decree of a competent Court on the ground of nullity of the marriage contract.

*SEC. 808. Every grand jury empanelled before any District or Circuit Court shall consist of not less than sixteen nor more than twenty three persons.

†SEC. 1910. Each of the District Courts in the Territories mentioned in the preceding section, shall have and exercise the same jurisdiction, in all cases arising under the Constitution and laws of the United States, as is vested in the Circuit and District Courts of the United States; and the first six days of every term of the respective District Courts, or so much thereof as is necessary, shall be appropriated to the trial of causes arising under such Constitution and laws; but writs of error and appeals in all such cases may be had to the Supreme Court in each Territory, as in other cases.

SEC. 629. The Circuit Court shall have original jurisdiction, as follows:

* * * Twentieth. Exclusive cognizance of all crimes and offences cognizable under the authority of the United States, except where it is or may be otherwise provided by law, and concurrent jurisdiction with the District Courts of crimes and offences cognizable therein.

‡SEC. 1851. The legislative power of every Territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and the laws of the United States. But no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of

Section 1866 of the Revised Statutes, (*) it has been decided that the Territorial Legislatures may confer such additional jurisdiction from time to time upon these Courts as they choose.†

It is well settled by this Court in *Clinton* vs. *Englebrecht*, 13 Wallace, p. 434, that the Territorial Courts, such as the District Court of Utah, where this case was tried, are not Circuit or District Courts of the United States, and that therefore, in the absence of express Congressional legislation on the subject, the Territorial Legislatures might regulate the practice, pleadings, and forms, as well as, to a certain extent, the jurisdiction of these Territorial Courts.

Clinton vs. *Englebrecht* arose exclusively under a Territorial statute, Section 102 of the Code (‡) of the Territory. The Territorial Legislature had previously enacted that juries should be drawn and empanelled in a certain way. A jury was drawn in that case by the District Court of the Territory in a way wholly different from that sanctioned by the law of the Territory. This was held to be error, because the general design of the organic Act being to enable the people of the Territory themselves to regulate their

the United States; nor shall the lands or other property of non residents be taxed higher than the land or other property of residents.

*Sec. 1866. The jurisdiction both appellate and original, of the Courts provided for in Section 1907–8, shall be limited by law.

†Sec. 1850. All laws passed by the Legislative Assembly and Governor of any Territory, except the Territories of Colorado, Dakota, Idaho, Montana, and Wyoming, shall be submitted to Congress, and, if disapproved, shall be null and of no effect.

‡See Record of the case of *Clinton* vs. *Englebrecht*, in the collection of Records of the Supreme Court of the United States in the Congressional Library. The Act is set forth in full in the argument of the Plaintiff in Error's counsel, p. 1. The case is of December Term, 1871, No. 379 (reported in 13 Wallace, p. 434.)

internal affairs, it would be an anomaly that they should have the power of passing statutes bestowing or limiting rights, and have no power to regulate the forms of procedure through which those rights should be vindicated.

But it is by Act of Congress that the Territorial District Courts have and exercise the same jurisdiction in all cases arising under the laws and Constitution of the United States as is vested in the Circuit and District Courts of the United States. Thus, in addition to the jurisdiction which may, under the permission of Congress, be parcelled out by the Territorial Legislatures to these Courts, there has also been conferred upon them the same jurisdiction which the Circuit and District Courts of the United States have elsewhere throughout the country. This latter jurisdiction is in no respect subject to Territorial control, but apart from and above all jurisdiction which can be conferred by the Territory.

The question remains whether where the right sought to be vindicated arises wholly under a Federal statute, a Territorial Court is bound in such case to adopt the method of procedure prescribed by the Legislature of the Territory. This point was suggested, though not decided, by MR. JUSTICE BRADLEY, in the case of *Hornbuckle* vs. *Toombs*, in 1873, 18 Wallace, p. 652. There an action had been brought in a Territorial Court of Montana, for damages caused by the diversion of a stream of water, and a verdict having been found for the plaintiff, the Court gave judgment, and in the same action granted an injunction against any further diversion, in accordance with the method of procedure prescribed by the Legislature of the Territory. The case was appealed to this Court, on the ground that the proceedings were erroneous, because they entirely disregarded the distinction between the chancery and common law jurisdiction conferred by Congress upon the Territorial Courts by the Organic Act.

The rights of the parties here depended upon no Federal statute, but existed at common law. In this case the Court held that under the general powers given to the Territorial Assemblies, they could define the jurisdiction of the several Courts, and regulate the method of procedure. That this decision referred exclusively to cases in which the Territorial Legislature possessed plenary power to grant or limit the right of the parties, as well as regulate the method of procedure, appears from the following language used by MR. JUSTICE BRADLEY:—

"It is true that the District Courts of the Territory are "by the Organic Act invested with the same jurisdiction in "all cases arising under the Constitution and laws of the "United States, as is vested in the Circuit and District Courts "of the United States: and a portion of each term is di- "rected to be appropriated to the trial of causes arising "under the said Constitution and laws. Whether, when act- "ing in this capacity, the said Courts are to be governed by "any of the regulations affecting the Circuit and District "Courts of the United States, is not now the question. A "large class of cases within the jurisdiction of the latter "Courts would not, under this clause, come in the Territorial "Courts, namely, those in which the jurisdiction depends on "the citizenship of the parties. Cases arising under the "Constitution and laws of the United States would be com- "posed mostly of revenue, admiralty, patent, and bankruptcy "cases, prosecutions for crimes against the United States, "and prosecutions and suits for infraction of the laws re- "lating to the civil rights under the 14th and 15th Amend- "ments. To avoid question and controversy as to the mode of "procedure in such cases where not already settled by law, "perhaps additional legislation would be desirable."

The question thus alluded to by Judge BRADLEY is now before this Court for adjudication.

By the procedure prescribed by Congress for the Federal Circuit and District Courts, every grand jury must consist of not less than sixteen, and by the organic law of all the Territories all laws of the United States, not locally inapplicable, have the same force throughout the Territories as elsewhere. (*)

Now, if where a crime is prohibited, or a right given, by a Federal statute, the mode in which the criminal is to be tried, or the right given is to be vindicated, can be regulated by a Territorial Legislature (unless expressly prevented by Congressional disapproval), the trial of such causes will greatly differ in the different Territories. In addition, Territorial Legislatures can impede the progress of such causes to a considerable extent. In Utah the Poland bill, passed in 1874, (†) expressly regulates how grand juries shall be summoned and drawn. But in the other Territories, where a man is indicted under a Federal statute, he may in one be entitled to have the jury drawn in such a manner as to give him privileges or advantages over a prisoner in a similar situation in another. Especially will this take place in cases where local opinion is likely to influence the community, such as those in regard to public lands, timber, &c., or to the taking of property, the title to which is in the United States. For if the Territorial Act can prescribe the number of which a grand jury may consist, it can, in the absence of express Federal legislation, prescribe from what vicinage it shall be taken, how many challenges the prisoner may have, how many the prosecution may have, or, indeed, for what cause a juror may be challenged, or for what he may not.

*Sec. 1891. The Constitution and all laws of the United States, which are not locally inapplicable, shall have the same force and effect within all the organized Territories, and in every Territory hereafter organized, as elsewhere within the United States.

†See Statutes at Large for 1874, p. 253, chapter 469.

Some of the States, (*) such as Ohio, Georgia, California, and Arkansas, have passed Acts on the subject of challenges to jurors. So long as this subject is not covered by Federal statutes, the passage of similar laws is certainly a proper subject of legislation within the meaning of Section 1851 of the Revised Statutes, and therefore within the power of the Territorial Legislatures. Nor is this all. Where Acts of Congress impose duties upon the District and Circuit Courts, in order to regulate the procedure in bankruptcy, admiralty, &c., a Territorial Legislature could likewise regulate the mode of procedure in such cases of the District Court of the Territory. This result logically follows. In many cases the mode of procedure—the method of obtaining a remedy—is a material part of the remedy itself. But it would be an anomaly in the Federal judicial system, if the Courts created by the Government for its Territories, and required to exercise the same jurisdiction as its tribunals elsewhere, could not exercise it in the uniform method provided for these tribunals, but only in that which might be prescribed from time to time by the local Assemblies of the Territories.

If it be objected that under Sec. 1011 of the Revised Statutes,† the Supreme Court cannot review a question raised by plea in abatement in the Court below; it is answered that this Court has frequently decided, that all errors patent upon the record are open to revision in the Court of Appeal, no matter in what form they may have been objected to in the Court below.

*1 Critchfield's Revised Statutes of Ohio (Edition of 1869), p. 754, §13. 2 California Digest (Edition of 1869), 351. Revised Statutes of Arkansas (1874), 679. *Reynolds* vs. *State*, 1 Kelly (Georgia), p. 228.

†Sec. 1011. There shall be no reversal in the Supreme Court or in the Circuit Court upon a writ of error, for error in ruling any plea in abatement, other than a plea to the jurisdiction of the Court, or for any error in fact.

In *Slacum* vs. *Pomeroy*, 6 Cranch. 223 (1810), Chief Justice MARSHALL said: "There can be no doubt that anything ap-"pearing upon the record which would have been fatal upon "a motion in arrest of judgment, is equally fatal upon a writ "of error."

In *Suydam* vs. *Williamson*, 20 Howard, 433 (1857), CLIFFORD, J., said: "The rule is, that whenever the error "is apparent on the record it is open to revision, whether it "be made to appear by bill of exceptions or in any other "manner." And such errors are open to revision here, without any motion in arrest of judgment or exception taken in the lower Court. *Bennett* vs. *Butterworth*, 11 How., 676.

Moreover such errors appearing of record, may even be considered by this Court, when not noticed by the Court below nor suggested by the counsel in argument; *Garland* v. *Davis*, 4 How., 143.

Now if the contention of the plaintiff in error be correct the record now before the Court discloses a fatal error, to wit: that the grand jury consisted of less than the number of persons *required by law*, and it can make no difference that the plaintiff in error chose to except by plea in abatement, rather than by motion in arrest of judgment or motion to quash. The whole record is properly before the Court for revision, and if it shows that a jury was empanelled in direct contravention of Sec. 808 of the Revised Statutes, which vital defect rendered all the subsequent proceedings in the case null and void, this Court may reverse of its own motion.

In addition, it must be born in mind that the Supreme Court has never possessed appellate jurisdiction in criminal cases; the only mode by which such cases could be brought up, being upon a certificate of division by the judges. (*Ex parte Gordon*, 1 Black, 503.)

Therefore, Section 1,011 of the Revised Statutes (*supra*) had reference to *civil cases* only.

But the Poland Bill in Sec. 3,* has specially given a writ of error from Utah to this Court, in capital cases, and where one has been convicted of bigamy, or polygamy. The terms of that Bill being general and unlimited; and Section 1,011 being never intended to apply to such cases, it must be presumed that in cases coming to this Court under this Act, all the rulings of the Court below may be reviewed, whether upon plea in abatement, or otherwise.

SECOND POINT.

The challenge of the defendant to the jurors *Eli Ransohoff* and *Charles Read* should have been allowed.

NOTE.—This point comprises the 6th and 8th assignments of error.

The 6th assignment of error (Record, page 29) is, "6th. The said Dis-"trict Court erred in overruling the challenge of the plaintiff in error to "the juror, Charles Reade." The 8th exception is, "8. The said Court "erred in overruling the challenge of the plaintiff in error to the juror, Eli "Ransohoff."

Eli Ransohoff, a juror, when examined on *voir dire* (see Record, page 13) by the District Attorney, said:

"Q. Have you formed or expressed an opinion as to the "guilt or the innocence of the prisoner at the bar?

"A. I have expressed an opinion by reading the papers "with the reports of the trial.

"Q. Would that opinion influence your verdict in hearing "the evidence?

"A. I don't think it would."

* United States Statutes at Large, 1874, p. 254.

Question by defendant. "You stated you had formed some "opinion by reading the reports of the previous trial?

"A. Yes, sir.

"Q. Is that an impression that still remains upon your "mind?

"A. No, I don't think it does; I only glanced over it as "everybody else does.

"Q. Do you think you could try the case wholly uninflu- "enced by anything?

"A. Yes, sir."

Charles Read, when he was called as a juror, was asked by the District Attorney:

"Q. Have you formed or expressed any opinion as to the "guilt or innocence of this charge?

"A. I believe I have formed an opinion."

By the Court. "Have you formed and expressed an opin- "ion?

"A. No, sir; I believe not.

"Q. You say you have formed an opinion?

"A. I have.

"Q. Is that based upon evidence?

"A. Nothing produced in Court.

"Q. Would that opinion influence your verdict?

"A. I don't think it would."

Question by defendant. "I understood you to say you had "formed an opinion, but not expressed it?

"A. I don't know that I have expressed an opinion; I have "formed one.

"Q. Do you now entertain that opinion?

"A. I do."

The defendant's challenge to both of these jurors was overruled by the Court.

The American cases in the Federal and highest State Courts, many of which are here collected, show that a juror who has formed a positive opinion as to the guilt or innocence of the prisoner, which he entertains on entering the jury box, is incompetent to try the cause; that an opinion is "positive" as opposed to hypothetical, when it is an opinion as to the truth or falsehood of the facts to be tried on the indictment, and not merely an opinion that if such facts should be true, the prisoner is guilty. See *infra*. It is indifferent whether the opinion, if positive, has been expressed or not; and it is expressly decided that where a juror admits that he has formed an opinion as to the prisoner's guilt, and is therefore incompetent, it is incumbent on the prosecution, not the prisoner, to make it appear that the opinion was merely hypothetical, or not such as to prejudice or bias his mind. (See *Stewart* vs. *The State of Arkansas infra*.)

The rule on this subject is thus laid down in the last edition of Wharton's Criminal Law (7th edition of 1877, section 3065): "In this country, as will presently be seen, the great "preponderance of authority is that the holding, by a juror, "of any opinions which may disqualify him from rendering "a verdict in accordance with the laws of the land, is a dis-"qualification."

In the Federal Courts, on the trial of Aaron Burr, (see Burr's trial, pages 414, 415,) CHIEF JUSTICE MARSHALL, after laying down the general rule that the accused has a right to a fair and impartial jury, says: "The jury should "enter upon the trial with minds open to those impressions "which the testimony and the law of the case ought to give, "not with these preconceived opinions, which will resist "those impressions." Again, on page 416, "the opinion "which has been avowed by the Court, is, that light impres-"sions which may fairly be supposed to yield to the testimony

"that may be offered,—which may leave the mind upon a "fair consideration of that testimony,—constitute no sufficient "objection to a juror; but that those strong and deep im- "pressions which will close the mind against the testimony "that may be offered in opposition to them, which will com- "bat all testimony, and resist its force, do constitute a suffi- "cient objection to him. Those who try the impartiality of "a juror ought to test him by this rule." In Hanway's trial for treason, *United States* vs. *Hanway*, 2d Wallace, Jr., page 143, this question came before the Court, GRIER, J., in the case of a number of jurors. One of the jurors, Walsh, was asked (see page 143,) whether he had formed or expressed any opinion as to the guilt or innocence of the accused, or of the other persons alleged to have participated with him in the offence charged. He answered that he had read the newspaper accounts at the time, "and came to his own con- "clusions." On his being challenged, the Court said: "Have "you formed a conclusive opinion as to whether the persons "engaged in this transaction are indictable for treason." *Juror*, "I think the offence treason." JUDGE GRIER, "You "have made up your mind, I understand you. Have you "ever expressed the opinion?" *The juror*, "I do not remem- "ber that I have expressed it." GRIER, J. "Q. Did you, "at that time, form the conclusion in your mind that the "offence was treason?" *The juror*, "I did, sir." GRIER, J., "That is sufficient," and Walsh was set aside.

It will be observed in this case that the Court did not ask the juror whether he felt able to try the case fairly, or not. The opinion having been formed at the time, absolutely, and not merely conditionally, the Court declared that that was sufficient to exclude him. In the *United States* vs. *Wilson & Porter* (1830), BALDWIN and HOPKINS, JJ., 1 Baldwin's Reports, pages 83 and 84, upon the jurors being called, and questions being put to them touching their indifference as

to the guilt or innocence of the prisoner, the Court laid down the rule to be:—

"That it is a good cause of challenge to a juror that he "has a bias or prejudice against the prisoner, and does not "stand indifferent towards him touching his guilt or inno- "cence of the crime with which he is charged. Or if he "has made up his mind, or expressed an opinion on the "subject."

In New York, in the case of *Ex parte Vermilyea*, (1826,) 6th Cowen's Reports, page 563, WOODRUFF, J., a juror who had been empanelled in a previous trial of the same cause, was admitted into the panel to try the same case again by the Court below. This was reversed by the Court of Appeals. "All experience (say they) goes to prove the infirmity of "human nature is such that we cannot, at pleasure, get rid "of preconceived opinions. The question is, not how great is "the bias, but does any exist? The least is sufficient to ex- "clude. Can the source from which it is derived be material? "As to the accused, it is the same thing, whether the bias "proceeds from a preconceived opinion, or malice and ill- "will. Be it either, he is equally affected. * * * * "In the case of *Coleman* vs. *Hagerman*, the same principle "was adopted by the Supreme Court. The late CHIEF JUS- "TICE SPENCER has furnished me with a manuscript opinion "of his in that cause. * * * * In the manuscript "opinion referred to, the late Chief Justice stated the prin- "ciples adopted by him on the then recent trial of Van "Alstyne for the murder of Huddlestone; it was thus: If "a person had formed or expressed an opinion for or against "the prisoner, on a knowledge of any of the facts attending "the murder, or from information of those acquainted with "the facts, he considered it a good cause of challenge; but "if the opinions of the jurors were formed on mere rumors

"and report, he decided that such opinions did not dis-
"qualify the jurors."

In *The People* vs. *Mather* (1830), 4 Wendell's Report, page 238, the defendant was indicted as a conspirator, and after a challenge was made to Samuel Clark, a juror, the juror stated that he had formed an opinion that the defendant was guilty, but it had never been expressed. The opinion was formed upon reports of what he had read and heard. The Judge charged the triors that if they believed that the juror had a fixed opinion, which it would require testimony to remove, he was disqualified, whether that opinion was founded on rumor alone, or on rumor and printed statements. The counsel for the prosecution excepted to the charge. The triors pronounced the juror not indifferent, and he was excluded. On a motion for a new trial, MARCY, J., affirming the ruling of the Court, decided that any opinion held as to the guilt of the accused before his trial was cause of challenge. There is, however, a distinction between positive and hypothetical opinions. (See page 243.) * * * Where a juror gives any decided opinion in the merits of the case, his declaration is merely hypothetical (as if a man say, if so and so has been done, the defendant is guilty); but where the opinion entertained was not hypothetical, but absolute as to the fact of guilt, the Court does not look beyond to examine the occasion or weigh the evidence on which that opinion is founded. (See page 242-43.)

In *The People* vs. *Rathbun* (1839), 21 Wendell's Reports, page 542, COWEN, J., says, on page 542, "The better opin-
"ion, I think, as collectable from these cases, is that the
"merely forming, without expressing, an opinion is principal
"cause." He refers to the two cases just cited, *ex parte Vermilyea*, and *The People* vs. *Mather*.

In *Cancemi* vs. *The People* (1858), STRONG, J., 2 Smith

[16 New York Reports], page 502–3, the defendant was tried for murder. One Alexander Kyle was called as a juror, and testified that he had formed an opinion and expressed it; and upon cross-examination said that he had no fixed opinion which could not be removed by the evidence. The Court thereupon overruled the challenge. On appeal, STRONG, J., said: "His (the juror's) opinion affecting his indifference "only could be inquired of, and he spoke of an opinion which "might be changed by the evidence on the trial, from which "it is apparent that he referred to an opinion on the main "issue; and a like understanding by the Court appears "from the reason given for its decision on the challenge, "that the proof did not, in the view of the Court, show that "the opinion was a fixed and absolute one; not that, if the "opinion had been proved to be of that character, it would "not have been a disqualification.

"The testimony of the juror on the challenge does not "disclose clearly the precise state of his mind in relation to "the case; but, on the contrary, it is ambiguous and sus- "ceptible of different constructions. That portion of it elicited "on his direct examination, that he formed and expressed "an opinion, standing alone, would have called for his rejec- "tion; the residue, given on his cross-examination, that he "had no fixed opinion, none which could not be removed by "the evidence, may be interpreted as qualifying the previous "statements, and to mean that he had only a hypothetical "impression not affecting his indifference as a juror. It "may, on the other hand, be interpreted to import that the "opinion which he had formed and expressed was not so fixed "that it might not be controlled by the evidence; regarding "the latter branch of the expression as explaining and defin- "ing what the juror intended by saying he had no fixed "opinion. In this view, the ordinary force of his testimony, "that he had formed and expressed an opinion in the case,

"would not be impaired. This testimony should be con-
"strued with liberality to the defendant, in the humane
"spirit which pervades our criminal laws and the rules of
"their administration."

"The rights secured by law to have a fair and impartial
"jury with minds open to receive, to weigh the evidence, and
"balanced in regard to the matters to be tried, is of the high-
"est importance, and should be carefully guarded by the
"Courts, especially in cases involving human life."

"In our opinion, the latter interpretation above stated
"should prevail, and upon that construction the juror was
"clearly disqualified. His mind was preoccupied with an
"opinion upon the issues to be tried, which it would require
"evidence to remove; and that, upon principle and by all
"the cases, incapacitated him for a juror."

In Maine. In *The State* vs. *Jewell* (1851), reported in the appendix to Reddington's Reports, page 583, four jurors were set aside by the Court for having formed opinions as to the guilt of the prisoner.

In Ohio. In *Foats* vs. *The State* [1857, BOWEN, J., 7 Critchfield's Reports, page 472], Hickman Bullock, who was called to sit as a juror, stated that he had formed an opinion as to the commission of the murder, and as to the guilt or innocence of the prisoner, but that he did not think that the opinion thus formed would influence his verdict in the case. The Court below overruled the challenge and permitted the juror to be sworn. On appeal, the Court, in reversing the judgment in this case, say: "Any previously formed opinion
"upon the question to be tried, or any partiality or prejudice
"against a party whose interests are involved, which will be
"likely to lead to conclusions unfavorable to him, in the
"determination of the issue, are causes which will warrant
"the challenging of a juror, and require his exclusion from

" the panel as being unsuitable to serve. The jury should " enter upon the trial with minds open to those impressions " which the testimony and the law of the case ought to make, " not with those preconceived opinions which will resist " those impressions. How was it with the juror, Hickman " Bullock? He had formed an opinion as to the commission " of the murder, and as to the guilt or innocence of the " prisoner. But he had confidence in his ability, notwith- " standing, to hold the scales of justice even—to hear dis- " passionately, and to decide impartially and justly the " prisoner's case. . . . It was said by Judge MARSHALL, " on the trial of Aaron Burr, that if the opinion formed be " on a point so essential as to go far toward a decision of the " whole case, and to have a real influence on the verdict to " be rendered, the distinction between a person who has " formed such an opinion, and one who has, in his mind, de- " decided the whole case, appears too slight to furnish the " Court with solid ground for distinguishing between them. " Bullock's condition of mind was not adapted to a dis- " interested and impartial canvassing of the testimony. As " an upright man, he might struggle to promote the finding " of a just verdict, but however firm his principles and moral " strength of purpose might be, there was still danger to be " apprehended in his capacity to go through the case, unin- " fluenced by the notions which he had already conceived. " The prisoner was not compelled to brave the consequences " of submitting to the determination of a trior who might " perchance be swayed by opinions which he had made up " before hearing the evidence. We think the juror ought to " have been set aside for incompetency."

In Illinois. In *Neely* vs. *The People* [1852, 13 Peck's Reports, page 685,] certain jurors having been examined as to their competency, stated that they had formed opinions from statements which they had heard, and that if the evi-

dence was different they would be governed by the evidence in finding a verdict in the case. TREAT, C. J., on appeal, said: "We have no doubt about this case. It was held in "*Smith* vs. *Eames*, 3 Scam., 76, that, if a juror has made up "a decided opinion respecting the merits of the controversy, "either from a personal knowledge of the facts, from the "statements of witnesses, from the relation of the parties, "or from rumor, he is disqualified from trying the case, if "challenged for cause. * * * Each of the jurors had "formed a definite opinion, * * * as to the guilt or "innocence of the prisoner, based upon information as to the "facts of the case, which he believed to be true. His opinion "was of a positive, and not of a hypothetical character. He "would have entered the jury box with a fixed opinion, as "to the question to be determined, which would have con-"trolled his action as a juror, unless the testimony disclosed "a set of facts materially different from what he already be-"lieved them to be."

In Wisconsin, in *Schaefler* vs. *The State* [1854, 3 Wisconsin Reports, page 831, SMITH, J.,] the defendant was indicted for murder. A juror named Morley stated, on examination on *voir dire*, "that he had formed an opinion con-"cerning the guilt or innocence of the defendants, formed "by talking with the neighbors; had read nothing of the "case; that the opinion would not influence his verdict, nor "prevent him from listening to the testimony impartially; "that he had an opinion whether the stories he had heard "were correct or not." This is the whole of his testimony. The Court, reversing the judgment below, said (see page 832): "A juror, who has already a fixed, settled opinion upon the "issue to be tried, cannot be called an impartial juror, and "the law declares him incompetent for that reason. But it "is not from impressions made upon the mind by reading or "hearing of the circumstances of the case, that can be called

"an opinion, such as the law contemplated. * * * *
"Hence, all such declarations as that his opinion would not
"influence his verdict, or prevent his properly weighing the
"evidence, etc., are of little moment, except that they may
"tend to delude the triors and the parties, as well as the
"juror himself. Here the juror stated that he had formed
"an opinion as to the guilt or innocence of the defendants,
"derived from stories heard from his neighbors, and had also
"an opinion as to the correctness of those stories; and we
"have only his word that such opinions would have no influ-
"ence upon his verdict. * * * Where a juror truly
"says that he has formed an opinion upon the matter upon
"issue, it were better that he should not sit upon the jury."

NOTE.—In this case the juror appears not to have sat, although the record did not disclose whether he had been challenged by the prosecution or the defendant, and the case was reversed for other reasons.

In Iowa. In *Trimble* vs. *The State*, [1850, 2 Green's Iowa Reports, page 404, WILLIAMS, C. J.], one of the jurors (see page 410), said: "that he had formed and expressed an
"opinion from the rumor or report he had heard in his
"neighborhood, soon after the murder was committed; that
"he had no acquaintance with the defendant, no ill will or
"prejudice against him; that he had no personal knowledge
"of the circumstances of the case; that he had never heard
"any of the testimony or conversed with any of the witnesses;
"that his opinion was conditional; that if what he had heard
"was true, he had formed an opinion; if what he had heard
"was not true, he had formed none." A challenge to the competency of this juror was overruled in the Court below. On appeal this ruling was reversed and the juror declared incompetent.

In Mississippi. In *Nelms* vs. *The State of Mississippi*

[1850, 13 Smeeds & Marshall's Reports, page 503], a juror stated, before being impanelled to try an indictment for murder, that he had formed and expressed an opinion from what he heard one Mansfield say some of the witnesses had told him, though the juror had never heard any of the witnesses say anything on the subject; that his opinions were not such as would influence his verdict, but that he would be governed by the evidence. The juror was held by the Court above, on appeal, to be incompetent, and the judgment was reversed. This rule was upheld in the same State in *Cotton vs. The State* [1857, 2 George's Reports, 31 Mississippi, page 509], where a juror answered that he had formed an opinion as to the guilt of the accused, such that it would "require testimony to remove it." The Court proceeded further to interrogate the juror, who stated "that his opinion was "formed from rumor, and that he felt as free to act in the "matter as if he had heard nothing about the case." The Court held the juror competent. On appeal, it was held that the facts of this case were stronger than in *Nelms* vs. *The State*, *supra*, and the judgment was for this reason reversed.

In Pennsylvania, In the case of the *Commonwealth* vs. *Lesher*, 17 Sergeant and Rawle, 155, (1828,) Tod, J., in discussing the competency of a juror who had conscientious scruples on the subject of capital punishment, remarked as follows:—"The law, in every case, is scrupulous to prevent "even the possibility of an undue bias. It does not deal "with the juror as with the witness: admitting, though it "doubts him. The slightest ground of prejudice is sufficient. "The prejudice itself need not be made out,—the probability "of it is enough. * * * * Any one who, in any possi- "ble way, no matter how honestly, has been warped by any "preconceived opinion which may affect his verdict, or has "made up his mind what verdict he is to give, and declared

"it, is excluded. Nothing in the law can well be more ex-
"tensive than this right of challenge, *propter affectum*
"* * * * All these matters of real or supposed taint
"upon the fairness of a juror are not to be left to the dis-
"cretion of triors; there is to be no inquiry whether the
"firmness of a man may not enable him to give a true ver-
"dict, when upon his oath, notwithstanding his previous
"opinions. The law makes no such experiment; but the
"moment that any such fact, relationship, favor, enmity,
"bias, or preconceived opinion is made out, it removes the
"juror without hearing one word further."

So in *Staup* vs. *The Commonwealth*, 24 P. F. Smith, page 460, (1873). A juror being called in a capital case said that he had formed and expressed an opinion as to the guilt or innocence of the prisoner; that he had read some evidence of a former trial, and still entertained that opinion; but this opinion would not bias or influence his judgment if he were sworn as a juror; that he could, and would make up his verdict exclusively upon the evidence given, uninfluenced and unbiased by his present opinion. The Court below refused to sustain a challenge to his competency. The Supreme Court, (AGNEW, J.), reversed this ruling of the Court below, and declared the juror to be incompetent.

In Virginia, *Armistead's Case*, 11 Leigh, page 658, (1841). A juror was called upon a trial for larceny, who stated that through having had a conversation with the prosecutor, he had formed an opinion as to the prisoner's guilt; that the opinion was not such but that it would yield to the influence of the evidence; that he would try the prisoner's case by the evidence alone, and had no doubt he could now give him a fair trial. The Court below overruled the prisoner's challenge to this juror. On appeal, this ruling was reversed, SCOTT, J., saying, "It was decided in Osi-

"ander's Case, 3 Leigh, 780, that a person who has formed "and expressed a decided opinion that the accused is guilty "or innocent of the offence for which he is about to be tried, "is unfit to sit upon the trial. It is supposed that there is "difficulty in ascertaining the true meaning of the term "'decided' when applied to an opinion. When the question "of the truth or falsehood of a proposition is presented to "the minds, the wise and discreet men examine, reflect, and "deliberate; and then, and not until then, *decide*. Some ex- "amine with more patience and perseverance, and reflect "more profoundly than others; some gifted beyond the ordi- "nary lot of man, or fancying themselves endowed with an "intuitive perception of truth and error, *decide*, after little "—nay, almost without any reflection; but whether the "solution has been arrived at by the longer or the shorter "process, the question no longer remains for deliberation: "it is *decided*. * * * We therefore reaffirm the rule "laid down in Osiander's Case, that he who has formed and "expressed a decided opinion * * * * whether that "opinion be formed on the evidence of witnesses whose testi- "mony he has heard on a former trial, conversation with "witnesses, or of common report, is not fit to sit upon a "trial. We go further, and say that it is immaterial whether "that opinion has been expressed or not."

In Arkansas, *Stewart* v. *The State*, 13 Arkansas, p. 740 (1853). Upon a trial for murder a juror was called, who being sworn on *voir dire* testified that he had formed an opinion as to the guilt of the prisoner from conversing with persons who were strangers to him. He did not know whether they were witnesses or not. He had not expressed his opinion, and it did not leave a prejudice against the prisoner in his mind. The Court below decided that he was competent. On appeal this ruling was reversed, the

Supreme Court holding (WATKINS, C. J.) that under the Arkansas Statute making the forming of an opinion on the issue a cause of challenge, when a juror had testified that he had formed an opinion it devolved upon the party resisting the challenge to remove the presumption that the opinion was not based upon mere rumor, or such as not to bias or prejudice the mind of the juror.

Conclusions.

The rule to be gathered from these authorities is, that a juror who has formed an opinion as to the truth or falsity of the charge in the indictment, is incompetent to sit upon the jury.

The degree of positiveness of course varies both in degree in the same man, and still more greatly in different men, but an opinion of this kind—that is, upon the actual fact of guilt or innocence, whether firmly fixed or no, must always be an opinion which would require evidence or argument to remove. This is never the case with a hypothetical opinion, that if certain facts be true, the prisoner is guilty: this is based upon a hypothetical state of facts, as to the existence or non-existence of which the individual holds himself in doubt.

Now, the issue on every criminal charge is as to its truth. Where the opinion is as to the truth of the fact charged in the indictment, it can make no difference whether the juror thinks his verdict would not be influenced by his opinion, or whether he thinks he could try the case fairly, or not. That is not what the prisoner has a right to. His right is to a fair and impartial jury, in the language of JUDGE STRONG, in *Cancemi* vs. *The People, supra*, "with minds open to re-"ceive and weigh the evidence, and balanced in regard to "the matters to be tried."

Still more strongly have the American Courts always ex-

cluded a juror on being challenged for cause, who has formed an opinion from having heard testimony of witnesses as to the fact charged. Now, in the case of *Charles Read*, the juror whose admission to the jury box forms the subject of the sixth error, he said that he had formed an opinion as to the guilt of the prisoner on this charge. He was then asked this question: "Is that based upon evidence?" He answered, "Nothing produced in Court."

He evades answering the question categorically, viz.: whether or no his opinion was based on evidence, and only denies that it was based upon any evidence *produced in Court*. The inference that must be drawn from this answer is, that his opinion was based on evidence submitted to him *out of Court*. No other hypothesis will satisfy the language used by the juror.

The juror was not examined by the United States to make it appear upon what this opinion was founded, but it has been expressly decided, see *Meyer* vs. *State of Arkansas*, 19 Ark. 156, that where a juror admits that he has formed an opinion as to the guilt or innocence of the prisoner, he is incompetent, and to remove the disqualification it is incumbent on the state, not the prisoner, to make it appear that the opinion was founded on rumor, and was not such as to bias or prejudice his mind.

In addition to the juror having *formed* an opinion, the last question put to him on *voir dire*, was:

"Q. Do you now entertain that opinion?"

"A. I do."

The prisoner therefore was tried by a juror, who, when sworn, adhered to the opinion previously entertained on the main issue to be tried, formed, it must be inferred from his language, on evidence not produced in Court. Under all

the authorities above quoted, he was incompetent, and the prisoner's challenge should have been sustained.

These reasons apply also to the case of Eli Ransohoff, the overruling of defendant's challenge to whom, forms the subject of the eighth error. Eli Ransohoff had expressed an opinion formed by reading papers containing reports of a former trial. He did not think that this opinion would influence his verdict, but, as we have already shewn, this could make no difference.

THIRD POINT.

The Court erred in asking several jurymen upon *voir dire* whether they were living in polygamy.

This forms the subject of the 5th, 7th, 9th, and 10th assignments of error. The 5th error is:

"5. The said District Court erred in sustaining the challenge upon the "part of the defendant in error to the juror, William A. Bills." The 7th error is:

"7. The said District Court erred in sustaining the challenge upon the "part of the defendant in error to the juror, Homer Brown." The 9th error is:

"9. The said Court erred in sustaining the challenge upon the part of the "defendant in error to the juror, Benjamin F. Cummings." The 10th error is:

"10. The said Court erred in sustaining the challenge upon the part of "the defendant in error to the juror, John W. Snell."

The Record, on p. 12, states that "Homer Brown, one "of the panel of the jury, being called and sworn to answer "questions, and appearing to be qualified in other respects, "was interrogated by the District Attorney, and answered "as follows upon the subject of polygamy:

"Q. Are you living in polygamy?

"A. I would rather not answer that."

The Court instructed the witness that he must answer the question, unless it would criminate him.

By the District Attorney:—

Q. You understand the conditions upon which you refuse?

A. Yes, sir.

Q. Have you such an opinion that you could not find a verdict for the commission of that crime?

A. I have no opinion on it in this particular case. I think under the evidence and the law I could render a verdict accordingly.

(Whereupon the United States challenged the said Homer Brown for favor, which challenge was sustained by the Court, and the said juror was excused, to which ruling of the Court the defendant excepted.)

JOHN W. SNELL, also a juror otherwise qualified, was asked on *voir dire*, as follows:

Q. Are you living in polygamy?

A. I decline to answer that question.

Q. On what ground?

A. It might criminate myself, but I am only a fornicator.

(Whereupon Snell was challenged by the United States for cause, which challenge was sustained.)

The present law, in regard to the examination of a juror on challenge, is laid down in the early English cases, viz.: that a juror can never be himself examined as to any criminal or infamous matter in order to sustain a challenge.

In *Anonymous*, in Salkeld's Reports p. 153, where one Cook, being indicted for high treason, and the jury called, it was offered to ask the jurors, in order to challenge them, if they had not said he was guilty, or would be hanged, it was

said by the Court: "this is a good cause of challenge, but "then the prisoner must prove it by witnesses, not out of "the mouth of the juryman. The juryman may be asked "upon *voir dire* whether he hath any interest in the cause; "whether he hath a freehold; for these do not make him "criminal; but you shall not ask a witness or juryman "whether he hath been whipped for larceny, or convict for "felony, or whether he was ever committed to Bridewell for "a pilferer, or to Newgate for clipping and coining, or "whether he is a villain or outlaw, because that would make "a man discover that of himself which tends to shame, crime, "infamy or misdemeanor."

See also Bacon's Abridgement Title "Juries," (12, F.) where the rule is laid down in the same words, and the case from Salkeld quoted.

This rule is repeated, almost in the language used in Salkeld, in Nathan Danes' "General Abridgment and Digest of American Law," [published in 1824, vol. 7, p. 334, chap. 221, art. 7, sec. 13]. "Also, the juror challenged may, on "*voir dire*, be asked such questions as do not tend to infamy "and disgrace; such as whether he hath a freehold, or hath "interest in the cause, and in a civil, but not in a criminal "case, if he has given an opinion beforehand on the right, "which he might have done as an arbitrator. And one wit- "ness to prove a challenge is sufficient. But in no case can "a juror be asked if he has been whipped for larceny, or "convicted of felony, &c., &c., for these kind of questions "tend to make a man discover that of himself which tends "to shame, infamy, and disgrace."

In *Hudson* vs. *The State*, (1824) 1 Blackford, page 319, Hudson was indicted for the murder of an Indian. In the Court below it was proposed, on the part of Hudson, to ask one of the petit jurymen, "Do you not be-

"lieve that the conviction and punishment of Hudson is "necessary to secure yourself, your family, or the country "from the retaliatory vengeance and depredation of the "Indians." This question was not permitted to be answered; to this ruling the defendant excepted. Upon appeal, BLACKFORD, Justice, sustained the ruling of the Court below, saying, "The belief mentioned in the question was a good cause of "challenge, we have no doubt, for how can that man's mind be "free from undue bias, who believes the conviction and pun- "ishment of the prisoner necessary on a charge of murder, "whether innocent or guilty? Such belief is pretty conclusive "evidence, not only of a prejudiced mind, but of a corrupt "heart. The difficulty is this: Shall an inquiry be permitted "of a juror, the object of which is to compel him to testify to his "own depravity? After much examination and reflection, we "have come to the opinion that the Circuit Court was right "in not allowing the question to be answered by the juryman, "himself. Extrinsic evidence certainly would have been ad- "missible to prove the belief of the jurors that it was neces- "sary to shed innocent blood: but we consider it contrary "to established law that he should himself be subject to such "an inquiry, tending so directly to his own infamy;" citing *The King* vs. *Edmunds*.

FOURTH POINT.

The Court erred in admitting the testimony given by Amelia Jane Schofield, on a former trial of a different indictment.

This point forms the subject of the 11th, 12th, 13th, 14th, 15th, and 16th assignments of error, which are (see Record, page 29):

11. The said Court erred in ruling that the defendant in error might prove what Amelia Jane Schofield testified to at the former trial.

12. The said Court erred in overruling the objection of the plaintiff in error to the reading by A. S. Patterson of the testimony given in the former trial by Amelia Jane Schofield, and permitting the same to be read to the jury.

13. The said Court erred in overruling the motion of the plaintiff in error to strike out the evidence read by the witness, A. S. Patterson.

14. The said Court erred in overruling the objections of the plaintiff in error to the introduction of the testimony of the witness, J. R. McBride, and in admitting his testimony.

15. The said Court erred in overruling the motion of the plaintiff in error to strike out that portion of the testimony of the witness, Hamilton Gamble, which he did move to strike out.

16. The said Court erred in overruling the motion of the plaintiff in error to strike out all the evidence of Amelia Jane Schofield, as given at the former trial of this cause in the evidence of the witnesses Patterson, McBride, and Gamble, and refusing to strike out the same.

After evidence had been given of the prisoner's first marriage, as charged in the indictment, the prosecution, in order to prove the second, offered to prove what one *Amelia Jane Schofield* had testified to upon a former trial of the same issue now in question between the same parties, *but upon another indictment*. This former indictment, upon the trial of which it is alleged that this testimony was offered, nowhere appears in the record. In order to admit this testimony, the prosecuting attorney called Arthur Pratt, a Deputy Marshal, who testified* that he had taken a subpœna

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* The following is the full testimony on this point, in the Bill of Exceptions:

Arthur Pratt, being duly sworn, testified as follows, to wit:—That he is and was at all times herein mentioned a Deputy Marshal. (Here a subpœna was shown witness, bearing date the day of , 1875, for witnesses in this case, and among other names thereon was the name of Mary Jane Schobold, but no such name as Amelia Jane Schofield.) Witness testified that this subpœna was placed in his hands to be served.

with the name of *Mary Jane Schobold* on it (but with no such name thereon as *Amelia Jane Schofield*), and had gone

(District Attorney.)

Q. Mr. Pratt, did you see Mr. Reynolds when you went to see Miss Schofield?

A. Yes, sir.

Q. Who did you enquire for?

A. I enquired for Mary Jane Schofield, to the best of my knowledge, that the name that is on the subpœna. I will state this, that I inserted the name in the subpœna, and intended it for the name of the woman examined in this case at the former term of the Court, and enquired for Mary Jane Schofield, or Mrs. Reynolds; I do not recollect certainly which.

Q. State the reply.

A. He said she was not at home.

Q. Did he say anything further?

A. I asked him then where I would find her. I said, "Where is she?" And he said, "You will have to find out."

Q. What else did he say? Did he know you to be a Deputy Marshal?

A. Yes, sir.

Q. Did you tell him what your business was as Deputy Marshal?

A. I don't remember now; I don't think I did.

Q. What else did he say?

A. He said, just as I was leaving, as I understood it, that she did not appear in this case. I made further inquiries for her at different houses, and was told—

Here defendant moved to strike out the testimony of the said Arthur Pratt, for the reason that witness has no subpœna for the witness that it was proposed to prove was concealed, or caused not to be found.

The Court denied the motion, and ordered a subpœna to issue for Amelia Jane Schofield, returnable instanter.

Upon the following day, at 10 o'clock A. M., the said subpœna for the said witness having issued about 9 o'clock P. M. of the day before, the said Arthur Pratt was again called upon, and testified as follows:

(By District Attorney.)

Q. State whether you are the officer that had that subpœna in your hands? (Exhibiting subpœna last issued, as above set forth.)

A. Yes, sir.

with this subpœna to the defendant's house and inquired for *Mary Jane Schofield*, or *Mrs. Reynolds*, he could not recol-

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Q. State to the Court what efforts you have made to serve it?

A. I went to the residence of Mr. Reynolds, and a lady was there, his first wife, and *she told me* that *this woman* was *not there, that that was the only home that she had, but that she hadn't been there for two or three weeks. I went again this morning, and she was not there.*

Q. Do you know anything about her home,—where she resides?

A. I know where I found her before.

Q. Where?

A. At the same place.

Q. You are the Deputy Marshal that executed the process of the Court?

A. Yes, sir.

Q. Repeat what Mr. Reynolds said to you when you went with the former subpœna introduced last evening?

A. I will state that I put her name on the subpœna myself. I know the party, and am well acquainted with her, and I intended it for the same party that I subpœnaed before in this case. He said that she *was not in*, and that I could get a search-warrant if I wanted to search the house. I said, "Will you tell me where she is?" He said, "No, that will be for you "to find out." He said, just as I was leaving the house,—I don't remember exactly what it was, but my best recollection is that he said, *she would not appear in this case.*

Q. Can't you state that more particularly?

A. I can't give you the exact words but I can say that was the purport of them.

Q. Give the words as nearly as you can?

A. Just as I said, I think those were his words.

Q. Did you hear him distinctly?

A. I think I did. It has been some time since, but I think those were his words. I would not be positive. I can give my best recollection on that.

Q. Repeat the words again as you understood them?

A. That she would not appear in this case.

Q. Give Reynold's exact words?

A. I don't think I could give his exact words on any of our conversations I am stating it according to my best recollection, knowledge, and belief.

lect which. He further testified that the defendant stated that she was not at home, and when the witness asked the

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Q. You were sworn here last night. Didn't you give his words differently last night to what you do this morning?

A. I think not.

Q. Are you positive of the fact?

A. I would not swear positively, but that was the tenor of his remarks.

Q. You say you cannot positively give Reynolds' words?

A. I don't think I can; probably I might.

Q. Tax your memory, and state them as nearly as you can.

A. That she don't appear in this case.

Q. Now give the words you used last night?

A. To the best of my recollection, those are the words that I used last night; I also stated that she was causing me considerable trouble, and that she would get into trouble herself; he said, "Oh, no, she won't, till the subpœna is served on her."

Q. Did you hear all that was said at that time by Mr. Reynolds?

A. I think I did.

Q. I will ask you to repeat the words that you used last night as to what Mr. Reynolds said to you, when you went to him on the prior occasion with that subpœna. Repeat just the words that you used last night?

A. When I went there I enquired for the party that I had subpœnaed once before, and he stated that she was not at home, and that if I wanted to search the house I could get a search warrant, or I could take his word for it. I told him I presumed I could take his word for it. Then I said, "Do you know where she is, then?" He says that *she does not appear in this case*. I then stated to him that she was causing me considerable trouble herself. He said, "Oh, no, she won't, not till she gets the subpœna."

Q. You stated that last night?

A. I didn't state the latter part of it.

Q. I understood you last night to say that he said something, but you did not understand what he said.

A. I stated, to the best of my knowledge and belief, that he said to me that she didn't appear in this case, or words to that effect, but this morning I can swear positively to the other statement I made to him about her getting me into trouble.

Q. You enquired I understand, for the person named in the subpœna, as it appeared last night—Mary Jane Schofield?

A. Mary Jane Schofield, or Mrs. Reynolds, the party I subpœnaed before at the same place.

defendant where he would find her, he said, "You will have to find out." The witness then said that *he thought* he un-

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It appeared that the said Amelia Jane Schofield had not been subpœnaed to appear at this trial.

The above is all the evidence showing, or tending to show, that the said witness, Amelia Jane, had been kept away, or prevented from being subpœnaed, or from appearing as a witness, by said defendant.

Thereupon the Court ruled that the prosecution might prove what the said Amelia Jane Schofield testified to upon the former trial, to which ruling the defendant excepted.

Thereupon A. S. Patterson was sworn for the prosecution, and testified as follows:

(By Prosecuting Attorney.)

Q. Mr. Patterson, will you read the testimony given in the former trial by Amelia Jane Schofield?

(Defendant objected to the witness's reading such testimony, because there had not been any foundation laid for reading the same, and because such evidence was incompetent. Which objection was overruled by the Court. To which ruling the defendant excepted).

(Witness reads):

"Amelia Jane Reynolds sworn for the prosecution.

"What is your name? Amelia Jane Reynolds. What was your name "before you were married? Amelia Jane Schofield. When were you "married? On the third day of August, 1874. To whom? Mr. Reynolds. "Where? In the Endowment House. You say at the Endowment House, "in this City? Yes, sir."

The defendant moved to strike out the evidence so read, for the reason that it was in no way connected with the defendant, as it only said Mr. Reynolds. Motion overruled, to which ruling defendant excepted.

J. R. McBride was sworn for the prosecution, and testified as follows:

(By District Attorney.)

Q. I will ask you if you heard the testimony of Amelia Jane Schofield at the last trial of this case, of which the notes have been read?

A. I was present and saw the lady examined.

Q. Will you state what the testimony was? Do you remember what it was?

A. I think I do.

derstood him to say that "she did not appear in this case," but he nowhere swears positively to this statement having been made.

(By Defendant.)

Q. Can you state precisely the words she used?

A. I think I can.

(By the Court.)

The Court will hold the witness to his best recollecelon of what she testified.

Defendant objects to the introduction of this testimony because, 1st. It is not competent testimony in any event. 2d. Because it is not shown that the witness, Amelia Jane Schofield, is dead. 3d. Because it is not sufficiently shown that the said witness has been kept away from this trial by the defendant. 4th. Because the written testimony, as read by the witness Patterson, is the best evidence.

The objections were overruled by the Court, to which ruling the defendant excepted.

Whereupon the witness proceeded, and testified as follows:

My recollection is that the witness came on the stand, took a seat, and was first asked what her name was. She stated Amelia Jane Reynolds. She was then asked when she was married, and she replied, stating the time. I would not be positive about the day, but it was in August, 1874, she stated, the previous August to the time she was examined. She was then asked to whom she was married, and my recollection is that she said to George Reynolds; I do not think I am mistaken, using the first name of the defendant.

Q. I will ask you if you remember anything about her speaking of the prisoner at the bar.

A. No, sir; I don't recollect that she did, except that she said George Reynolds; I am not sure of that; that is my best recollection of it.

Hamilton Gamble, sworn for the people.

Q. Were you present at the former trial of this case?

A. I was most of the time, sir.

Q. Were you present when Amelia Jane Schofield, sometimes called Amelia Jane Reynolds, was examined?

A. Yes, sir.

Q. Go on and state what she testified to.

It appearing that *Amelia Jane Schofield*, whose testimony in the former trial was proposed to be proven, had never been subpœnaed, the Court ordered a new subpœna to issue for *Amelia Jane Schofield*, returnable instanter (Record, page 15). This subpœna issued about 9 o'clock at night, and at 10 o'clock the following morning the witness was asked, the *last subpœna being shown him*,

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(Objected to on the same ground. Objection overruled. Exception.)

Witness.

The witness was asked what her name was. She replied that her name was Amelia——Reynolds. Her middle name I have forgotten. She was asked when she was married. She replied, in August, naming the day, 1874. She was asked to whom, and she replied to Mr. Reynolds. I don't recollect that she gave the first name of her husband, but my recollection is very distinct and clear that the District Attorney motioned, indicating the prisoner, and that the witness assented, and said that was the man.

Cross-examined.

X Q. You don't remember, you say, that she was asked if this defendant was the man?

A. That is precisely what I do say, that she was asked by a motion, whether that was the man, and she assented.

Defendant moves to strike out so much of that testimony as refers to the motion, on the ground that Mr. Gamble could only guess what that motion meant, to wit: "That, Mr. Gamble, is simply your impression of what was "meant by the District Attorney, and what she meant by the motion, is it "not?"

Court:

Wait a moment, I will overrule the objection, and let it go to the jury.

Exception.

The defendant moved to strike out all the evidence of Amelia Jane Schofield, as given at the former trial, and reproduced at this trial in the evidence of Patterson, McBride, and Gamble, on the ground that she was incompetent to testify at the former trial, it appearing from her evidence that she was the wife of the defendant, Reynolds.

(Motion overruled, and defendant excepted.)

"Q. State to the Court what effort you have made to "serve it.

"A. I went to the residence of Mr. Reynolds, and the lady "was there, his first wife, and she told me that this woman "was not there; that that was the only home she had, but "that she had not been there for two or three weeks. I went "again this morning, and she was not there.

"Q. Do you know anything about her home, where she "resides?

"A. I know where I found her before.

"Q. Where?

"A. At the same place."

This is the only testimony as to any efforts having been made to subpœna *Amelia Jane Schofield*. "Thereupon the "Prosecuting Attorney called one A. S. Patterson, (see Re- "cord, page 17), who testified as follows:

"Thereupon *A. S. Patterson* was sworn for the prosecution. "and testified as follows:

"By Prosecuting Attorney.

"Q. Mr. Patterson, will you read the testimony given in "the former trial by Amelia Jane Schofield?

"(Defendant objected to the witness's reading such testi- "mony, because there had not been any foundation laid for "reading the same, and because such evidence was incom- "petent, which objection was overruled by the Court, to "which ruling the defendant excepted.)"

"Witness reads:—

"Amelia Jane Reynolds sworn for the prosecution. 'What "is your name?' 'Amelia Jane Reynolds.' 'What was "your name before you were married?' 'Amelia Jane "Schofield.' 'When were you married?' 'On the third "day of August, 1874.' 'To whom?' 'Mr. Reynolds.'

"'Where?' 'In the Endowment House.' 'You say at the "Endowment House, in this City?' 'Yes, sir.'"

This is all the testimony given by Patterson.

Now in the first place, the rule of law is, that in order to prove what a witness has testified to on the former trial of a case, it must be first shown that the witness is dead, or out of the jurisdiction of the Court, or that *having been summoned*, he appears to have been kept away by the adverse party.* (See 1 Greenleaf on Evidence, §163.) In all other cases, the witness must himself be called on the trial, in order to give the adverse party an opportunity of cross-examination.

But no proof was offered that this testimony, or any testimony was given by *Amelia Jane Schofield* on any trial of *this* indictment; it appears on the contrary (Record, page 14, folios 29 and 30), that this defendant was formerly tried for bigamy, but on another indictment which nowhere appears, and there is no *proof* in the Record or Bill of Exceptions as to what that indictment contained, what the issue was on it, what the offence charged by it was, or if bigamy, with whom the offence was alleged to have been committed. Unless positive proof of these facts appear, neither the Court below, or this Court on Error can say whether or not the testimony given by Amelia Jane Schofield on the trial of another indictment, was testimony upon the same issue as the one formed by the present indictment, or not.

But, besides this, the Court after objection, allowed one *A. S. Patterson* to read a certain paper, alleged to contain

*"In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation, *to be confronted with the witnesses against him*, to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defence." Amendments to Constitution U. S. Art. VI.

testimony given on the former trial by *Amelia Jane Schofield*. The contents of this paper thus read were material to the facts at issue. But no proof was given of what this paper the witness read from, was, when it had been written, or that the witness himself *had any knowledge whatever of it*, or *of its contents, other than reading it at the time*. This was wholly erroneous and irregular, and forms in itself sufficient cause for reversal.

The American authorities, upon the question of evidence above stated, viz., what ground is required to be laid, before what a witness said upon a former trial can be given in evidence, may now be stated.

In Pennsylvania, in *Richardson* vs. *The Lessee of Stewart* (1815), 2 Sergeant & Rawle's Reports, 84, Chief Justice TILGHMAN decided, in an action of ejectment, that where the witness was living, and within the jurisdiction of the Court, evidence could not be given of what he swore in a former suit between the same parties. "He should," the Chief Justice said, "either have been brought to Court to "give testimony, or his deposition should have been taken "under a rule of Court, as usual."

In *Chess* vs. *Chess* (1828), 17 Sergeant & Rawle, page 409, it was held by Judge TOD that the evidence of the former testimony of one Robert Hays could not be received, Hays being still in full life, and residing in the county. Here Hays was excluded from his oath by a subsequent interest in the case.

In *Huidekoper* vs. *Cotton*, 3 Watts, 56 (1834), notes of testimony of a witness taken before a magistrate, were offered in evidence to prove what the witness had sworn to. This evidence was objected to as incompetent, as the witnesses themselves were not shown to be without the jurisdiction of

the Court. Judge HUSTON held that this offer of evidence was properly rejected.

In New York the rule has always been that the evidence of what a witness has testified to on a former trial between the same parties, is not admissible, unless it is first shown that the witness is dead.

In *Powell* vs. *Waters* (1819), 17 Johnson's Reports, page 176, SPENCER, C. J., said, "There is no force in the objection "* * * * as to the overruling the proof of what a wit- "ness had sworn on a former trial. * * * * To entitle "a party to give in evidence the testimony of a witness in a "former trial, it must be shown that the witness is dead: "and this was not so or pretended."

In the cases already quoted the point seems to have been decided as it arose, rather as a matter of course, and as a thing about which there is little doubt. In *Wilbur* vs. *Selden*, however, decided in New York in 1826, and reported in 6 Cowen's Reports, the subject was discussed on principle, and at some length by SAVAGE, Chief Justice. In the case before him he said, "The parties are substantially the same, "the cause of action the same, and the point in issue the "same. But the witness, Scott, is not dead; he is absent "in the State of Pennsylvania, and possibly upon inquiry "there he can be found and examined upon commission." He referred to *Barron* vs. *Crombie*, 14 Massachusetts Reports, 36, where the Supreme Court refused to hear what had been sworn to by a witness who, though naturally alive, was civilly dead, having been convicted of felony. The testimony was held to be inadmissible.

In *Cary* v. *Sprague*, (1834), 12 Wendell's Reports, Judge NELSON, speaking of this kind of testimony, said, see page 45: "It will not be allowed unless the witness be dead, and "his death affirmatively shown. Even diligent inquiry with-

"out being able to find the witness is not sufficient, though "it is obvious, and there can scarcely be a shade of differ- "ence between the two cases, death and absence, either in "principal or hardship. I mention these circumstances to "show the strictness with which the rule is guarded by the "Court."

In *The People* v. *Newman*, (1843), 5 Hill's Reports, page 295, Newman, the prisoner, was tried and convicted of grand larceny. There had been a previous trial under the same indictment, followed by disagreement of the jury. One Blackman was sworn at the first trial as a witness for the People, and he having since removed from the state, the District Attorney proposed to give in evidence his former testimony, which was objected to, but received. The Court on appeal, said: "It seems to be settled in this Court that "nothing short of the witness' death can be received to let "in his testimony given on a former trial." Referring to the cases above quoted, he then said: "But if the rule were "otherwise in respect to civil cases, we are of opinion that "it should not be applied to criminal proceedings." This was especially adjudged in *Timm* v. *The Commonwealth*, 5 Randolph's Reports, (Virginia), 701 and 708. It was there said by Brockenbrough, J., that even the death of a witness would not, in a criminal case, be allowed as a reason for receiving his former testimony.

In Virginia the law has long been settled to be the same as in New York. (See *Brogy* v. *The Commonwealth*, 10 Grattan, 722.)

In Illinois (*Bergen* vs. *The People*, 17 Ill., 426), and **Alabama** (*Dupree* vs. *The State*, 33 Ala., 380), the rule is the same.

But in addition, there was no evidence whatever given on the trial as to the authenticity or the character of the

paper from which A. S. Patterson read to the jury. Indeed it does not appear in the record or bill of exceptions what the paper was, or whether Mr. Patterson knew of his own knowledge, anything that the paper contained. It is expressly decided in the *United States* v. *William Wood*, (1818), 3 Washington's Circuit Court Reports, by WASHINGTON, J., that a witness who attempts to testify as to what another witness, now dead, has said on the previous trial of a case, must be sure of the accuracy of the statement from *his own recollection*, and not merely from his confidence in the accuracy of a statement to which he refers. In this case, the prisoner was indicted for robbing the mail. The prosecution offered a witness to prove what a *Mr. Hare* had sworn to at the former trial. This was objected to.

By the Court: "The evidence is admissible, provided the "witness can repeat the testimony which *Hare* gave . . . "He may refresh his memory from notes which he took from "evidence at the former trial, or from a newspaper printed "by himself containing the evidence of *Hare*, as taken down "by the witness; but he must be sure of the accuracy of the "statement, *from his own recollection and not merely from "a confidence in the accuracy of a statement to which he "refers.*"* "The plaintiff acknowledged that he could not "say that he recollected the words of *Hare*, although he felt "the most entire confidence that he had taken them down as "the witness uttered them, and that they were truly copied "into the paper published under his own inspection."

"The Court refused to suffer him to be examined."

It is sufficient to add, that there was no evidence that Amelia Jane Schofield, *having been summoned*, was kept away by the procurement of the defendant. The record shows that she was not summoned.

*The italics here are those of the present plaintiff in error.

FIFTH POINT.

The Court erred in its charge in refusing to instruct the jury that if they found that the defendant was married in pursuance of and conformity with what he believed at the time to be a religious duty, their verdict should be "not guilty;" and in instructing the jury that if the defendant, under the influence of a religious belief that it was right, deliberately married a second time, having a first wife living, the want of consciousness of evil intent, the want of understanding on his part that he was committing a crime, does not excuse him, but the law inexorably in such case implies criminal intent.

This part of the charge is found on page 19 of the printed record, and forms the subject of the 17th, 18th, and 19th errors assigned.

17. The said Court erred in refusing to charge the jury as requested by the plaintiff in error, concerning his belief as to such marriage being a religious duty.

18. The said Court erred in refusing to charge the jury, as requested by the plaintiff in error, concerning the criminal intent.

19. The said Court erred in giving the charge it did to the jury that "the "law in such cases implies criminal intent."

In approaching the discussion of this error, we desire to keep steadily in view the provision of the Constitution (Art. IV., Sect. III., 2), which gives to Congress "power to dis- "pose of and make all needful rules and regulations respect- "ing the Territory of the United States," and the decisions of this Court upon it. Undoubtedly Congress may legislate

over such Territory, and may regulate the form of its local government. But this legislation can be neither exclusive nor arbitrary. Not exclusive, because there is but one case in which it can be so. (Art. I., Sect. VIII., 18.) Not arbitrary, since there must be some limitation to the generality of this power.

It is not designed here to go into the supposed distinction between the application of this clause of the Constitution to territory which belonged to the United States at the time of the adoption of the Constitution, and its application to territory afterwards acquired. This subject is elaborately discussed in 19 Howard, pages 432 to 450. It is, or ought to be, so far as this error is concerned, a distinction without a difference. For no constitutional lawyer should hesitate to give his assent to the negative proposition that citizens of the United States who migrate to a Territory cannot be ruled as mere colonists, dependent upon the will of the General Government, and be governed by any laws it may think proper to impose. A power in this Government to obtain and hold Territories, over which it might legislate without restriction, would be inconsistent with its own existence in its present form. Now this government of Territories should be always such as would best subserve the interests of the Territory, looking to its situation as a territory, and the number and character of its inhabitants. In regard to all local matters it would be more advisable to commit the powers of self government to the people of the Territory as most competent to determine what was best for their interests. To illustrate briefly: Could any of the Amendments to the Constitution be disregarded in legislating for a Territory? The answer would be in the negative as to most of them. Yet some are certainly in terms applicable to a STATE. Article II for instance, asserts that "a well regulated militia being necessary to the security

"of a free State, the right of the people to keep and bear "arms shall not be infringed." It would be contrary to the genius of the Constitution for Congress to pass a law depriving the people of a Territory of this right. Other examples of a similar character might be put.

But it will be said, that this construction does not control the power of Congress to pass laws prohibiting the perpetration of crimes in Territories, of things, *mala in se*. Possibly not. But what is a *malum in se?* This is just the point in issue. As to murder, theft, false swearing, and offences affecting the rights of others, the way may be clear. But is the so-called offence struck at by the Act of 1 July, 1862, (Rev. Statutes, Sec. 5,352,) within this category? The great difference between bigamy as ordinarily understood, and the offence under the Statute, Sec. 5,352, is to be observed.

This crime ordinarily involves deception on the part of the person committing it. No man in most of the United States could commit it without concealing a prior marriage. But here the woman (or man) with whom bigamy is committed, knows beforehand of the prior marriage. The woman, to whom a man already married is again married, is not deceived nor injured against her own will, or without her own knowledge.

Bigamy is not prohibited by the general moral code. There is no command against it in the decalogue. Its prohibition may, perhaps, be said to be found in the teachings of the New Testament. Granted, for the purpose of the argument. But a majority of the inhabitants might be persons not recognizing the binding force of this dispensation. In point of fact, we know that a majority of the people of this particular Territory deny that the Christian law makes any such prohibition. We are therefore led to the assertion that

as to the people of this Territory the supposed offence is a creature of positive enactment. Had Congress a right to fasten this burthen upon them?

We deny that it had, and shall contend that the passage of this statute was beyond its powers. In other words, there is always an excess of power, when any attempt is made by the Federal Legislature to provide for more than the assertion and preservation of the rights of the General Government over a Territory, leaving necessarily the enactment of all laws relating to the social and domestic life of its inhabitants, as well as its internal police, to the people dwelling in the Territory.

But whether Congress had or had not the right to make the having of more than one husband or wife at the same time a criminal offence, surely we must look at the intent of the party who is charged with the violation of a criminal statute.

It is conceded that the unconscious commission of an act, which if consciously done would be criminal, is not a crime. So, where an act is done, or left undone, from an honest belief that its commission or omission is not wrong, but positively right, there can be no criminal intent, and of course no commission of crime. Thus it has been held in the case of one who belonged to a religious community which thought it a violation of God's commandments to administer temporal aid or remedies to the sick, that there could be no conviction of the crime of manslaughter by reason of a neglect to provide medicine and suitable care for a sick child. See *Regina* vs. *Wagstaff*, 10 Cox's Criminal Cases, 530. WILLES, Justice) 1868). In consequence of this case the statute of 31 and 32 Victoria was passed rendering the neglect to provide medical assistance a criminal offence.

Now how does the case in hand differ from the case of *Regina* vs. *Wagstaff*? Let it be conceded that the Act

of Congress making the having of two wives at the same time a criminal offense, is entirely free from constitutional objection. Still in order to make out a conviction under it, you must bring home to the offender *guilty knowledge*. This is the very gist of the offense, as it necessarily is of all crimes. You cannot sucessfully argue that every one who consciously commits an act, is to be held responsible for all its results, criminal or otherwise. This is a begging of the whole question. If one who commits an act which the law makes criminal, either knows that he is doing a criminal act, or being indifferent to the results of the act committed, still commits it, he may be brought within the reasoning of the rule, which holds that every one is responsible for the consequences of his voluntary acts. But this is merely a rule of interpretation, adopted for convenience, where it is difficult or impossible to prove motive or criminal intention. But where the defendant disclaiming criminal intention, shows, or offers to show, by positive testimony, that he is entirely free from guilty *animus*, there the rule has no application, and we are left simply to the question of guilty intention, to be shown from the conduct of the person who commits the act. The line of reasoning is as follows: A person *non compos mentis*, can have no guilty intention. One who does the act involuntarily, is free from criminality. One who commits or abstains from an act under a belief that it is God's will that he should do so, is free from guilt. So here, one who contracts the relation forbidden by statute, in the belief that it is not only pleasing to the Almighty, but that it is positively commanded, cannot have the guilty mind which is essential to the commission of a crime. He may make himself CIVILLY responsible for the results of his act, because its effect upon others is altogether independent of motive. But he cannot be CRIMINALLY responsible, since guilty intent is not only consciously absent, but there is present a positive belief that

the act complained of is lawful, and even acceptable to the Deity. This line of reasoning may make it difficult to deal criminally with certain (supposed) infractions of the moral law, as it is admittedly difficult to deal with breaches of the religious law, but it is none the less logical and convincing.

We hold, therefore, that the judge erred in refusing the instruction prayed for under the prayer, the refusal of which is made the subject of the errors assigned under this head, and that the judgment should be therefore reversed.

SIXTH POINT.

The Court erred in charging the jury. "I think it "not improper in the discharge of your duties in this "case that you should consider what are to be the "consequences to the innocent victims of this delu- "sion. As this contest goes on they multiply, and "there are pure minded women and there are inno- "cent children, innocent in a sense even beyond the "degree of the innocence of childhood itself. These "are to be the sufferers, and as jurors fail to do their "duty, and as these cases come up in the Territory, "just so do its victims multiply and spread them- "selves over the land."

This point forms the subject of the twentieth assignment of error which is

"20. The said Court erred in that portion of the charge given to the "jury and excepted to by the plaintiff in error, wherein the jury are charged "that they should consider what are to be the consequences to the innocent "victims of this delusion, etc."

In considering the language it should be borne in mind that the law under which this defendant is prosecuted is one, which, while in terms it applies to all the Territories, is aimed at the Territory of Utah. Under the Poland Bill the prosecution is conducted exclusively by the law officers of the United States, and the jurors who are to try the cause are summoned by the United States Marshal. In a criminal case therefore like the present, where the whole power of the Government is arrayed against an individual, it peculiarly behooves the judge that presides in the Court to see that the prisoner has an impartial trial. He should refrain from making any remarks to the jury either during the progress of the case or in his charge, which may bear unduly upon the prisoner. Especially should he refrain from making allusions to contemporary matters of public interest which are supposed to be involved in the guilt or innocence of the accused, or expatiate upon the necessity of a conviction or acquittal.

These considerations are, in any case, entirely outside of the merits of the issue to be passed upon by the jury, which concern only the guilt or innocence of the accused. But they are particularly so in a case like this.

This is sufficiently plain. These considerations, always improper for a jury, were presented to them with the irresistible force with which all remarks come from him to whom they look for guidance during the trial, and who is to them for the time being, the embodiment of the law itself. It might have been supposed that a Judge on the trial of a cause such as this, would have cautioned those to whom was committed the ascertainment of the guilt or innocence of the defendant, to look at nothing outside of the matter directly before them. But here, on the contrary, what was said by the Judge tended to inflame and prejudice the jurors. His

remarks really withdrew their minds from the true issue to the consideration of another and different one, and which was presented to them as the existence of a great social evil which it was their duty to remove. The jury became, in this view, both a legislative and an executive body, and not the triers of a criminal offence alleged to have been committed by an individual. What chance had he of fair deliverance with a jury thus instructed? None whatever. And the course taken was clearly erroneous.

In the *Credit Mobilier of America* vs. *The Commonwealth of Pennsylvania*, 1870, reported in 17 P. F. Smith, 67 Pa. State Reports, p. 283, the Credit Mobilier of America appealed from a settlement of tax against them by the accounting officers of the Commonwealth of Pennsylvania.

The cause was twice tried before PEARSON, J. On the second trial before the Court below (see Report, p. 259), after the testimony was in, the Judge answered the points put by the counsel for the defendants and the plaintiffs, and then in his general charge used this languag—(see p. 275 of the report): "There is great ground to fear that here-"after very many corporations created by our laws will so "contrive as to have the profits of their business go into the "hands of trustees, to be by them divided among their "stockholders, and never go into the corporation treasury, "whereby the State will be defeated in its efforts to collect "taxes on the Company's dividends." * * * (See p. 279 of the report). "But one thing is clear. Soon after the first "of July, 1868, this corporation was unable to advance "money, and it was discovered that it had sunk nearly one "million of dollars capital, though managed by the same "men all the time. It looks as if this poor Pennsylvania "corporation had strayed off to the city of New York, where, 'like the wayfarer from Jerusalem to Jericho, it fell among

"thieves, who stripped it pretty effectually. But that has "nothing to do with this tax."

The decision in this case was reversed by the Court, READ, J., delivering the opinion. On page 290 of the report he says: "The Court (below) say, 'there is great ground to fear "'that hereafter very many corporations created by our "'laws will so contrive as to have the profits go into the "'hands of trustees, to be by them divided among their "'stockholders, and never go into the corporation treasury, "'whereby the State will be defeated in its efforts to collect "'taxes on the Company's dividends.' This fear, which no "doubt affected the jury, is groundless when the individual "stockholders throw away the shield of the corporation, and "act as individuals personally liable for all their acts, con- "tracts, and engagements. An individual may be described "by his Christian name and sur-name, or he may be so de- "scribed as to point him out just as definitely and certainly, "and such description does not remove or affect his personal "liability, and that is the real question here. Are they not "individually and personally liable to the extent of their "private fortunes? If so, the State cannot tax their indi- "vidual profits as the dividends of a corporation.

"The general tenor of the charge was calculated to con- "vey the idea to the jury that there was a huge fraud, which, "however modified, withdrawn, and explained, had done its "work effectually. 'But one thing,' said the Court, 'is "'clear; that soon after the first of July, 1868, this corpora- "'tion was unable to advance money, and it was discovered "'that it had sunk nearly one million of its capital, though "'managed by the same men all the time. It looks as if "'this poor Pennsylvania corporation had strayed off to the "'City of New York, where, like the wayfarer from Jerusa- "'lem to Jericho, it fell among thieves, who stripped it

" ' pretty effectually. But that has nothing to with this tax.'
" Then why say it? For, coming from a judge of very high
" character, in a deliberately written charge, its effect must
" have been overwhelming.

" We have shown what were the real merits of the case,
" and do not intend to repeat them, but as a whole, the
" charge of the judge and his answers tended to mislead the
" jury."

The above is the comment made but recently by the late Chief Justice of Pennsylvania in a civil case, on the trial of which the judge had used language which referred to outside public matters that had nothing to do with the case.

In the *State of Louisiana* vs. *John Shields* (1856), reported in the 11th volume of the Louisiana Annual Reports, page 395, on a trial for murder, the Judge told the jury that " Murder is of very frequent occurrence in this community, " and when a jury have a case of murder which is clearly " made out, the Court believes it necessary for a jury to bring " in an unqualified verdict, in order to deter others from the " crime." One of the grounds relied upon for a reversal of the decree was this language used by the Judge. The Appellate Court, LEA, J., said, " In the case at bar, the " charge of the Court was similar in meaning [to the case of " the State against Obragon, just quoted] *and in its necessary* " *effect upon the minds of the jury.* The Court remarked to " the jury, ' Murder is of very frequent occurrence in this " ' community, and when a jury has a case of murder that is " ' clearly made out, the Court believes it necessary for a " ' jury to bring in an unqualified verdict, in order to deter " ' others from the crime.' Such a charge was calculated to " impress upon the minds of the jurors that in all cases of " murder they were not at liberty, or at least could not with " propriety, exercise that discretion which is expressly con-

"ferred by the statute of 1846, which declares that in *all* "*cases*, where the punishment demanded by law is death, it "shall be lawful for the jury to qualify their verdict by add- "ing thereto 'Without capital punishment.' We think the "discretion of the jury should not have been trammelled by "instructions which were not only calculated to secure an un- "qualified verdict, but might have been construed by the "jury into an intimation of the opinion of the Court as to "the guilt or innocence of the prisoner."

In the *State of Louisiana* vs. *John Melvin*, same volume, page 535, on a trial for murder, the prisoner was found guilty, and sentenced by the Court below to death. He appealed, on the ground that the Judge below, in his charge to the jury, stated to the jury "That cases of murder were "fearfully numerous in this city; that a conviction of a "charge of murder had ceased to be a cause of excitement, "and had become a common affair of almost daily occur- "rence; that confinement in the State Penitentiary for life "was no adequate punishment for the crime of murder, and "that juries had no right to qualify their verdict, unless "there were mitigating circumstances; that convicts in the "penitentiary seldom serve out their term when confined "there for life; that a late Governor of this State had par- "doned almost everybody, and that convicts were always in "hopes that after a few years they would appeal to a clement "Executive, and that none but capital punishment would put "a stop to the practice, now common, of man and woman "killing; that he, the Judge, in a late visit to the peniten- "tiary, had been told by parties sentenced by him, inmates "of the State Prison now, that they hoped in a short time "to come out. * * * * * * *

"If there could be a doubt under the English common law "with regard to the propriety of such a charge in a criminal "case, the legislative enactments of Louisiana would compel

"us, however reluctantly, to say that it was erroneous. The "Act of April 30th, 1853, declares, that in his charge in "criminal cases the Judge must limit himself to giving the "jury a knowledge of the law applicable to the cause submit- "ted to them. * * * * Under these statutes the Judge "should carefully avoid giving the jury any indication of his "own opinion touching the facts of the case, or the guilt or "innocence of the prisoner. * * * * * * We are not "insensible to the public evils deprecated by the District "Judge, and which naturally provoked the strong expressions "contained in his charge. But we are sitting as judges to apply "the laws as they are, to a particular controversy growing "out of facts; and not as legislators, to regulate and prescribe "general rules in the future."

These cases clearly show how improper it is for the Judge trying a cause to allude to matters of public policy, which may tend to influence the jury. In the case at bar the Court left the jury no alternative but to convict the prisoner.

GEORGE W. BIDDLE,
BEN SHEEKS,
Of Counsel for Plaintiff in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

GEORGE REYNOLDS, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.
} No. 180.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

GEORGE REYNOLDS, PLAINTIFF IN ERROR,
vs.
THE UNITED STATES.
} No. 180.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF UTAH.

BRIEF FOR THE UNITED STATES.

Indictment in the third judicial district of Utah Territory. The defendant pleaded six pleas in abatement; and these having been overruled, pleaded further *not guilty*. Having been convicted, he appealed to the supreme court of the Territory: and from that court, in which the judgment below was affirmed, sued out a writ of error here.

The statutes bearing upon the case are as follows:

Every person having a husband or wife living, who marries another, whether married or single, in a Territory, or other place over which the United States have exclusive jurisdiction, is guilty

of bigamy, and shall be punished by a fine of not more than five hundred dollars, and by imprisonment for a term not more than five years; but this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage is absent for five successive years, and is not known to such person to be living; nor to any person by reason of any former marriage which has been dissolved by decree of a competent court; nor to any person by reason of any former marriage which has been pronounced void by decree of a competent court on the ground of nullity of the marriage contract.—(Rev. Stat., sec. 5352. Act July 1, 1862.)

A writ of error from the Supreme Court of the United States to the supreme court of the Territory [of Utah] shall lie in criminal cases, where the accused shall have been sentenced to capital punishment or convicted of bigamy or polygamy. * * * —(Act of 1874, ch. 469, sec. 3, 18 Stat., 254.)

That within sixty days after the passage of this act, and in the month of January annually thereafter, the clerk of the district court in each judicial district [in the Territory of Utah], and the judge of probate of the county in which the district court is next to be held, shall prepare a jury-list from which grand and petit jurors shall be drawn to serve in the district courts of such district until a new list shall be made as herein provided. Said clerk and probate judge shall alternately select the name of a male citizen of the United States who has resided in the district for the period of six months next preceding, and who can read and write in the English language; and, as selected, the name and residence of each shall be entered upon the list, until the same shall contain two hundred names, when the same shall be duly certified by such clerk and probate judge; and the same shall be filed in the office of the clerk of such district court, and a duplicate copy shall be made and certified by such officers and filed in the office of said probate judge. Whenever a grand or petit jury is to be drawn to serve at any term of a district court, the judge of such district shall give public notice of the time and

place of the drawing of such jury, which shall be at least twelve days before the commencement of such term; and on the day and at the place thus fixed, the judge of such district shall hold an open session of his court, and shall preside at the drawing of such jury; and the clerk of such court shall write the name of such person on the jury-list returned and filed in his office upon a separate slip of paper, as nearly as practicable of the same size and form, and all such slips shall, by the clerk in open court, be placed in a covered box and thoroughly mixed and mingled, and thereupon the United States marshal or his deputy shall proceed to fairly draw by lot from said box such number of names as may have previously been directed by said judge; and if both a grand and petit jury are to be drawn, the grand jury shall be drawn first, and when the drawing shall have been concluded, the clerk of the district court shall issue a venire to the marshal or his deputy directing him to summon the persons so drawn, and the same shall be duly served on each of the persons so drawn, at least seven days before the commencement of the term at which they are to serve; and the jurors so drawn and summoned shall constitute the regular grand and petit juries for the term for all cases. And the names thus drawn from the box by the clerk shall not be returned to or again placed in said box until a new jury-list shall be made. If during any term of the district court any additional grand or petit jurors shall be necessary, the same shall be drawn from said box by the United States marshal in open court, but if the attendance of those drawn cannot be obtained in a reasonable time, other names may be drawn in the same manner. Each party, whether in civil or criminal cases, shall be allowed three peremptory challenges except in capital cases, where the prosecution and the defense shall each be allowed fifteen challenges. In criminal cases the court, and not the jury, shall pronounce the punishment under the limitation prescribed by law. The grand-jury must inquire into the case of every person imprisoned within the district on a criminal charge and not indicted; into the condition and management of the public prison within the district; and into the willful corrupt misconduct in office of public officers of every description within the district; and they are also entitled to free access, at all reasonable times, to the public prisons, and to the examination, without charge, of all public records within the district.—(Act last cited, sec. 4, 18 Stat. 254.)

The indictment against Reynolds is as follows:

UNITED STATES OF AMERICA,
Territory of Utah:

Third judicial district of the October term, A. D. 1875, of the district court in and for said district, held in Salt Lake County.

Indictment for bigamy.

THE UNITED STATES }
vs.
GEORGE REYNOLDS. }

The grand jurors of the United States of America, good and lawful men, residents of the third judicial district of Utah Territory, legally chosen, selected, empaneled, sworn, and charged in and for the body of said district, in the name and by the authority of the United States of America, on their oaths do find and present that George Reynolds, late of said district, on the twenty-second day of July, in the year of our Lord one thousand eight hundred and sixty-five, in the city and county of Salt Lake, in the Territory of Utah, and within the jurisdiction of this court, was lawfully married to one Mary Ann Tuddenham, and her, the said Mary Ann Tuddenham, then and there had and took for his wife and cohabited with her as her lawful husband; and that afterwards he, the said George Reynolds, on the third day of August, in the year of our Lord one thousand eight hundred and seventy-four, in the city of Salt Lake, and county of Salt Lake, and Territory of Utah, did unlawfully marry and take to wife one Amelia Jane Schofield, he, the said George Reynolds, then and there being married and the lawful husband of the said Mary Ann, she, the said Mary Ann, then being his former wife and living; she, the said Mary Ann, the wife by the said former marriage, not having been absent from the said George Reynolds for five successive years without being known to said George Reynolds within that time to be living; the said former marriage between the said George Reynolds and the said Mary Ann never having been dissolved by the decree of a competent court, nor annulled or pronounced void by the sentence or decree of a competent court on the ground of the nullity of the marriage contract entered into as aforesaid by the said George Reynolds and the said Mary Ann,

contrary to the form of the statute of the United States of America, and against the peace and dignity of the said United States.

HORACE BLISS,
Foreman of the Grand Jury.
WILLIAM CAREY,
Attorney for the United States for the Territory of Utah.

Indictment for bigamy.

THE UNITED STATES } No. 2148.
vs.
GEORGE REYNOLDS. }

A true bill.

HORACE BLISS, *Foreman.*

Presented in open court by the foreman of the grand jury in the presence of said grand jury, and filed by me this 30th day of October, A. D. 1875.

EDW'D B. McKEAN, *Clerk.*

The pleas in abatement were grounded respectively on the following suggestions: 1, the grand jury which found the bill consisted of fifteen members and no more; 2, no public notice of the time and place of drawing such jury had been given; 3, one Greenwald, drawn upon such jury, was omitted from the panel without cause; 4, one Klopenstine and one Godfrey were sworn thereon contrary to law; 5, such jury was not properly drawn; and 6, it was not *sworn*. (See Opinion of the supreme court of Utah, Record, p. 25.)

The United States demurred to the first plea, and replied to the others.

In reference to the demurrer, all that seems necessary to say is, that express provisions of the Territorial law require the grand jury to consist of *fifteen*—ex. gr. act

of February 18, 1870, sec. 4: "The court shall empanel out of the lists summoned as grand jurors, fifteen eligible men to serve as a grand jury"; (Compiled Laws of Utah, 1876, p. 357); and see provision to same effect in act of 1853, on page 652, of same volume.

The *bill* exhibits eighteen exceptions taken at the trial below.

Exceptions 1 and 2 (folio 24) were to the admission of *parol evidence* to show a fulfillment of the requirements of the act of 1874, (*a*) as to *notice* of time and place of drawing the grand jury, and (*b*) as to the forms of such drawing; inasmuch as such fulfillment should have appeared by the *record*, and so evidence thereof *aliunde* was incompetent.

In reply to this it is submitted that these are some of the incidents to procedure that are often omitted from the record, their existence for all courts of superior jurisdiction being presumed. (2 Bishop's Crim. Proc., sec. 1190, &c., and notes.)

Exceptions 3, 5, 7, and 8 (folios 25, 27, 28, and 29) were for allowances to the United States of challenges to jurors for cause. In each case the juror was asked whether he were living in bigamy, and declined to answer, on the ground that it would criminate him.

It is submitted that sufficient presumption of bias arose from that state of things to justify the court acting as trior to find such bias as a fact.

Exceptions 4 and 6 (folios 26 and 28) were for overruling challenges for cause by the defendant. In the *first* case the juror had formed and still entertained an

opinion (not upon evidence "produced in court"), but was not shown to have expressed it, and said that it would not influence his verdict. In the *second*, the juror had formed an opinion by reading reports in newspapers, and had expressed it; he said that the *reading* was careless, and that the impression did not remain, and he thought he could try the case uninfluenced.

It is submitted that the examinations of these jurors disclosed sufficient evidence to warrant the court in finding *insufficiency* as a fact.

Exceptions 9, 10, 11, and 12 (folios 35 and 36) were because of the admission of a report of what one Amelia Jane Schofield (the second wife) had sworn upon a previous trial of the case.

This party was absent, and a question was made whether she had not been influenced to absent herself by the defendant.

The evidence upon this point was that when an officer, who had gone to the defendant's house (also *her* residence) to summon her, inquired of the defendant where she was, the latter answered that she was not at home, and also, "She does not appear in this case."

This is evidence that the absence of the witness was probably caused by the defendant. In all the above exceptions, as the district court was the proper tribunal to pass upon the (preliminary) fact, its findings cannot be impeached, unless this court shall think that there was *no evidence* as to such fact.

Exceptions 13 and 14 (folios 37 and 38) to the *previous evidence* given by Schofield, as not identifying the defendant; and to the court's allowing a witness, who proved orally what the witness Schofield had *previously*

sworn, to say that she in speaking of Reynolds *pointed at him* then being present.

It is submitted that these exceptions are without substance.

Exception 15 (folio 38) is to Schofield's competency, for the reason that, when testifying, she spoke of herself as defendant's *wife;* 16 (folio 39), is because the court refused to instruct the jury that the circumstance that polygamy was a *matter of religion* with the church to which the defendant belonged, was a defense; 17 (folio 40), is because the court instructed the jury that if defendant deliberately married again, "the law inexorably implies criminal intent; and 18 (folio 40), because the court called on the jury to consider "the consequences to the innocent victims of this delusion," &c.

None of these last-mentioned exceptions call for any remark.

In conclusion, the twenty-first assignment of error by the defendant (record, p. 29, bottom), viz, that the record does not show that the indictment was returned and presented by the grand jury in open court, appears to be flatly contradicted by an entry upon the record, page 2, near top, see ante p. 5.

S. F. PHILLIPS,
Solicitor-General.

In the Supreme Court of the United States.

REYNOLDS
vs.
THE UNITED STATES. } No. 180.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

REYNOLDS
vs.
THE UNITED STATES. } No. 180.

BRIEF FOR THE UNITED STATES.

APPENDIX.

The brief for the United States having been printed before that of the plaintiff in error was filed, it becomes necessary, after perusing the latter, to add something, especially in reference to points of law which from the opinion of the supreme court of Utah (found in the record) seem not to have been distinctly argued below.

1. The objection that the number of persons required for the grand jury must be determined by the laws of the United States, and not by those of Utah, is met by an express provision of the statute passed in reference to crimes in that Territory, quoted in the brief for the United States, viz: "Thereupon the United States marshal or his deputy shall proceed to fairly draw by lot from said box *such number of names as may have previously been directed by said judge*." (Brief, p. 3.)

Of course it is to be presumed, as the drawing was

done at *an open session of the court, in the presence of the judge*, that the drawing was according to such direction, and that the judge naturally controlled his discretion by the statute of the Territory which he was accustomed to administer.

2. As regards the challenge of the jurors *Ranschoff* and *Read*.

The examination upon the *voir dire* in each case was begun by the district attorney, and continued by the counsel for the prisoner.

There is nothing upon the face of the record to show *against which party* the opinion bore.

The question presented to this court is as to some *error* upon the part of the court below appearing upon the record. The court will not presume error.

The court below may have overruled the challenge because the challenger did not show that the unindifferency suggested was prejudicial *to himself*. That alone would justify the decision. Benton's case, 2 Dev. and Batt. (N. C.), 196 (at p. 217, *et seq.*); 3d Wharton, Cr. Law, sec. 3012 (ed. 1868).

Upon the principal question, the American authorities are to be found in Wharton's Criminal Law, vol. 3d. We submit that, upon the state of the evidence, a question of *fact* was raised for the trier (the court), and therefore that his decision thereupon cannot be *error*.

Benton's case (above), GASTON, J.

Ellington's case, 7 Iredell (N. C.), 61, RUFFIN, C. J.

3. As regards the question, upon the *voir dire*, whether the person proposed as a juror was living in polygamy.

Polygamy is not an *infamous* offense under the United States law, and, moreover, is not *infamous* under the

law or public opinion of the Territory in which the trial was had. It is suggested upon the record that in the latter place it is even a religious observance.

4. In reference to the evidence of *Schofield*.

The court evidently found that she had been kept away by the defendant, and there was evidence of that.

This circumstance avoided the necessity of *confronting* him with her; for thereby he had waived that constitutional privilege.

To make the previous testimony of one who is absent at the time of trial admissible against a party because of contumacy by the latter in preventing his presence, it is not necessary that the person should have been actually summoned. The reason of the thing shows that if the party believed that such person would be summoned, and interfered to prevent it, the situation is the same as if the interference had occurred after the summons. The record here shows that Reynolds's interference was in anticipation of an expected summons of Schofield.

Upon this general topic, see Williams *v.* State (19 Ga., 402); R. *v.* Scaife (17 Q. B., 238); R. *v.* Guttridge (2 C. & P., 473); Morley's case (6 How. St. Tr., 770).

So also the test of the competency of the testimony given by Schofield previously is, Did the defendant then have a right to cross-examine her? (1 Gr. Ev., ch. 10.)

CHARLES DEVENS,
Attorney-General.

S. F. PHILLIPS,
Solicitor-General.

In the cases of *Commonwealth* vs. *Kraemer*, 3 Binn. 584, and *Bourne The King*, 7 Adolph. & Ellis 58, it was held that an erroneous sentence must be reversed entirely by the Court of error.

Now it is true that this error was not specifically assigned or taken; but as it is apparent on the record, it is supposed your honorable Court will notice it in having its attention called to it; more especially is it to be considered in this application for a rehearing of the cause.

In view of the consequences, both criminal as well as social, which the decision of this and similiar cases will bring, not only to the individuals accused, but also to their families and their children, your petitioner humbly asks of this Honorable Court for a re argument of the above mentioned cause, or of such exceptions as relate to the admission of the testimony alleged to have been given by *Amelia Jane Schofield* on a former trial of a different indictment, to wit: the 11th, 12th, 13th, 14th, 15th, and 16th assignments of error; and on the question of the illegality of the sentence.

GEORGE REYNOLDS.

BEN SHEEKS,
G. W. BIDDLE,
Of Counsel with Petitioner.

Dec. 1878 Judge Swayne

In the matter of the case of GEORGE REYNOLDS, *Plaintiff in Error,* *vs.* THE UNITED STATES, *Defendant in Error.*	Supreme Court of United States. Error to Supreme Court of Utah. October Term, 1878. No. 180.

To the Honorable the Judges of the Supreme Court of the United States:

The petition of *George Reynolds*, the plaintiff in error in the above case, respectfully represents:

1. That he is the defendant in the suit originally prosecuted in the Territory of Utah, and was indicted in the District Court of said Territory for having married one *Amelia Jane Schofield* while he was then already married to one *Mary Ann Tuddenham*, the indictment being under Section 5352 of the Revised Statutes of the United States, p. 1044, viz.: "Section 5352. Every person having a husband or wife "living who marries another, whether married or single, in a Territory, or "other place, over which the United States have exclusive jurisdiction, is "guilty of bigamy, and shall be punished by a fine of not more than five "hundred dollars, and by an imprisonment for a term of not more than five "years: but this section shall not extend to any person by reason of any "former marriage, whose husband or wife, by such marriage, is absent for "five successive years, and is not known to such person to be alive; nor to "any person by reason of any former marriage which has been dissolved "by the decree of a competent Court; nor to any person by reason of any "former marriage which has been pronounced void by the decree of a com-"petent Court on the ground of nullity of the marriage contract."

2. That on said trial the prosecution offered one *A. S Patterson* as a witness to prove what one *Amelia Jane Scho-*

field had testified to in a former trial of another indictment by the United States against your petitioner under the same section of the Revised Statutes.

Whereupon your petitioner objected to the introduction of this testimony, because, First, it was not competent in any event. Second, it was not shown that the witness, Amelia Jane Schofield, was dead, or that she had been kept away from this trial by the defendant, and because in any event the testimony, as read by the witness Patterson, was the best evidence; but these objections were overruled by the Court, to which ruling your petitioner excepted, and the witness was allowed to proceed and testify, as will appear by printed pages 14–17, of the Record, which has been heretofore exhibited to your Honors.

Your petitioner respectfully represents to your Honorable Court that he was injuriously affected by the introduction of this testimony, and believes his trial was greatly prejudiced thereby, he having had no opportunity of cross-examining the said witness; and deprived of the right secured to him under the sixth section of the amendment to the Constitution of the United States, to be confronted with the witnesses against him.

Your petitioner begs leave further respectfully to state he is a citizen of Utah, a Territory in the United States, where a great number of people have been indicted lately for offences under the same section of the revised statute, and that the trials of many of these cases are pending. Your petitioner therefore states on behalf of himself, and of others similarly placed, that it is of the utmost importance that they should have in these trials a full, fair, and impartial hearing, and that no prejudices which may exist against himself or other similarly situated individuals may be allowed to weigh against

them in the minds of a jury, and that an opportunity to ascertain by cross-examination the real scope and effect of the testimony of the absent witness is taken away.

It further appears from the record, printed on page 10, that your petitioner was sentenced to "be imprisoned AT "HARD LABOR for a term of two years."

This was a clear violation of the law. Sec. 5352 of the Revised Statutes, under which your petitioner was convicted, provided that whoever is found guilty of bigamy "shall be "punished by a fine of not more than $500, and by impris- "onment for a term not more than five years."

That it was an error to add *hard labor* to the punishment here provided all the authorities agree.

Two or three of the more prominent ones are here referred to.

In *Daniels* vs. *The Commonwealth*, 7 Barr (7 Penna. St. 371), the plaintiff in error was convicted of obtaining goods under false pretences. The Act of Assembly imposed a punishment of imprisonment in the penitentiary or county jail, at the discretion of the Court. The Court below sentenced the prisoner to imprisonment in the county prison *at hard labor*. On appeal this sentence was held to be illegal, ROGERS, J., saying, "It is better to confine ourselves to the Act, which "must be our guide in inflicting the punishment, which is fine "and imprisonment without labor—the latter an addition "not warranted by statute. The late venerated Chief Jus- "tice (TILGHMAN) never ventured to sentence a convict "without having the Act inflicting the punishment before "him; and his sentence was as near as could be in the "words of the Act—an example worthy of imitation, and, if "strictly observed, would save the Court some trouble, "besides contributing to a more satisfactory administration "of justice."

In the cases of *Commonwealth* vs. *Kenney*, 3 Binn. 581, and *Eneas The King*, 7 Adolph. & Ellis 58, it was held that an erroneous sentence must be reversed [illegible] by the Court of error.

Now it is true that this error was not specifically assigned or taken; but as it is apparent on the record, it is supposed your honorable Court will notice it in having its attention called to it; more especially is it to be considered in this application for a rehearing of the cause.

In view of the consequences, both criminal as well as moral, which the decision of this and [illegible] cases will produce, not only to the individuals accused, but also to their families and their children, your petitioner humbly asks of this Honorable Court [illegible] argument of the above mentioned exception or such exceptions as relate to the admission of the testimony alleged to have been given on *Anderson's* [illegible] *self* on a former trial of a different character, to say, the 11th, 12th, 13th, 14th, 15th, and 16th assignments of error, and on the question of the allegiety of the said [illegible]

GEORGE REYNOLDS

BEN. SHEEKS

G. W. BIDDLE

Counsel for Petitioner

Apr 22. 79 Sub C

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

GEO. REYNOLDS
v.
UNITED STATES. } No. 180.

ERROR TO SUPREME COURT OF UTAH.

DEFENDANTS' BRIEF ON MOTION FOR REARGUMENT.

In the Supreme Court of the United States.

OCTOBER TERM, 1878.

GEO. REYNOLDS
v.
UNITED STATES. } No. 180.

ERROR TO SUPREME COURT OF UTAH.

DEFENDANTS' BRIEF ON MOTION FOR REARGUMENT.

I.

There is no occasion to discuss the subject of the admission of the testimony of A. S. Patterson, as it has been already sufficiently considered.

II.

The sentence to hard labor was correct.

R. S., sec. 5539. "Whenever any criminal, convicted of any offense against the United States, is imprisoned in the jail or penitentiary of any State or Territory, such criminal shall in all respects be subject to the same discipline and treatment as convicts sentenced by the courts of the State or Territory in which such jail or peniten-

tiary is situated; and while so confined therein shall be exclusively under the control of the officers having charge of the same under the laws of such State or Territory."

The Territorial act of Utah, approved January 18, 1861, § 4, provides that "all convicts hereafter sentenced, excepting such as may be sentenced to solitary confinement, may be put to hard labor, not exceeding ten hours each day, Sundays excepted, under the regulations that are or may be hereafter prescribed by the directors." (Comp. Laws of Utah, A. D. 1876, page 108.)

Relating to the method of performing a public duty, *may* is construed to mean *shall*. (Mason *v.* Fearson, 9 How., 259; Supervisors *v.* U. S., 4 Wall., 446, and authorities *passim*.)

III.

If it were error to include hard labor as part of the sentence, this court can cause the proper sentence to be passed. The Supreme Court of Pennsylvania has said:

"The doubts which formerly existed respecting the power of the Supreme Court, upon reversing a judgment in a criminal case, are entirely dissipated. We have authorities to show that the Supreme Court, on reversal of a judgment in a criminal case for error in the sentence, has power to pass such sentence as the court below ought to have passed" [citing cases]. * * * "The act of July 16, 1836, conferred no new powers in this respect. It was designed to remove doubts which had arisen in consequence of conflicting decisions. The common law embodies in itself sufficient reason and common sense to reject the monstrous doctrine that a prisoner

whose guilt is established by a regular verdict is to escape punishment altogether, because the court committed an error in passing the sentence. If this court sanctioned such a rule it would fail to perform the chief duty for which it was established. Our duty is to correct errors and 'minister justice.' But such a course would perpetuate error and produce the most intolerable injustice." (Beale *v.* Com., 25 Penn. St., 22, per Lewis, C. J. *See, also*, Daniels *v.* Com., 7 Penn. St., 371, cited by appellant; Kelly *v.* State, 3 Sm. & Marsh., 518.)

IV.

It is substantially the same thing for this court to enter the proper judgment or to remand it to the Territorial court with directions to do so; but the usual course of procedure, and the locality of the record, may render the latter method preferable.

If the verdict is sustained, but the judgment thereon is erroneous in one particular, this court should only reverse that part in which the error exists and affirm the rest.

CHARLES DEVENS,
Attorney-General.
EDWIN B. SMITH,
Assistant Attorney-General.